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No. 11923 253

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

JUL -2 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Bernardino, Calif.

For Appellee:

JAMES M. CARTER,
United States Attorney,
CLYDE C. DOWNING,
Assistant U. S. Attorney,
600 U. S. Post Office &
Court House Bldg.,
Los Angeles 12, Calif. [1*]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 4428-BH Civil

UNITED STATES OF AMERICA,

Plaintiff.

vs.

HOWARD B. MORROW,

Defendant.

COMPLAINT ON GUARANTY

Comes Now the United States of America, plaintiff herein by Charles H. Carr, United States Attorney in and for the Southern District of California, Ronald Walker and Wm. W. Worthington, Assistant United States Attorneys in said District, and for its Complaint against the defendant herein above named alleges and states:

I.

Defendant is a resident of the County of Los Angeles, State of California, and within the jurisdiction of this Honorable Court.

II.

Heretofore and on and subsequent to the 18th day of November, 1942, the American National Bank of San Bernardino, California, loaned to Morrow Aircraft Corporation the sum of \$225,000.00, evidenced by a promissory note of the Morrow Aircraft Corporation dated November 18, 1942, in the principal amount of \$225,000.00.

III.

Thereafter the said Morrow Aircraft Corporation defaulted in payment of principal and interest of said loan and that the plaintiff [2] herein, by assignment dated the 29th day of November, 1944, from the American National Bank of San Bernardino, became and now is the owner and holder of said promissory note of November 18, 1942, in the sum of \$225,000.00, which said note is past due and unpaid as to both principal and interest.

IV.

That heretofore and on the 13th day of November, 1942, the defendant herein made, executed and delivered to the American National Bank of San Bernardino his continuing guaranty in the sum of \$100,000.00 for the purpose of guaranteeing in said sum of \$100,000.00 the payment of said note of \$225,000.00; that a photostat of said guaranty is hereto attached, marked "Exhibit I" and made a part hereof.

V.

That heretofore and on the 29th day of November, 1944, the American National Bank of San Bernardino, California, made, executed and delivered to the United States of America an assignment wherein and whereby, among other things, it assigned to the plaintiff herein the aforesaid guaranty of Howard B. Morrow and that plaintiff is now the holder and owner of said guaranty.

VI.

That plaintiff herein has demanded of defendant

the payment in the sum of \$100,000.00 in accordance with the terms of said guaranty, but that defendant has wholly failed and refused and still wholly fails and refuses to pay same or any part thereof, and that there is now due and owing from defendant to plaintiff herein under terms and provisions of the said guaranty the sum of \$100,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$100,000.00, together with interest at the rate of six per cent (6%) per annum thereon from the 13th day of November, 1944, together with costs and disbursements of this action.

CHARLES H. CARR,
United States Attorney.
RONALD WALKER and
WM. W. WORTHINGTON,
Assistant U. S. Attorneys.

/s/ WM. W. WORTHINGTON,
Attorneys for Plaintiff.

EXHIBIT "I"

GUARANTY

For valuable consideration, the undersigned (hereinafter called Guarantors) jointly and severally guarantee and promise to pay to The American National Bank of San Bernardino (hereinafter called Bank), or order, on demand, in lawful money of the United States, that certain indebtedness of Morrow Aircraft Corporation, (hereinafter called Borrower) to the said Bank, evidenced by a promis-

sory note of even date herewith, in the face amount of \$225,000.00.

The liability of said Guarantors nevertheless, shall not exceed at any time or under any circumstances, the sum of \$100,000.00, but it is expressly understood and agreed that the Bank may receive and apply upon such indebtedness any and all payments from the Borrower without reducing the liability of said Guarantors except insofar and to such extent as the balance of principal and interest due upon the said note shall be reduced thereby below \$100,000.00.

The obligations hereunder are joint and several, and independent of the obligations of Borrower, and a separate action or actions may be brought and prosecuted against Guarantors whether action is brought against Borrower or whether Borrower be joined in any such action or actions; and Guarantors waive the benefit of any statute of limitations affecting their liability hereunder or the enforcement thereof.

Guarantors waive any right to require Bank to (a) proceed against Borrower; (b) proceed against or exhaust any security held from Borrower; or (c) pursue any other remedy in Bank's power whatsoever. Until all indebtedness of Borrower to bank shall have been paid in full, even though such indebtedness is in excess of Guarantors' liability hereunder, Guarantors shall have no right of subrogation, and waive any right to enforce any remedy which Bank now has or may hereafter have against Borrower, and waive any benefit of, and

any right to participate in any security now or hereafter held by Bank. Guarantors waive all presentments, demands for performances, notices of non-performance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty.

All moneys received by the Bank for Borrower may, within the sole discretion of Bank (1) be applied to the payment of interest on or any part of the principal of the indebtedness to which this guarantee relates, (2) be held by the Bank without interest as cash collateral for said loan, or (3) be released to the Borrower, and guarantors waive any right to object to any application [4] of funds made as aforesaid.

In addition to all liens upon, and rights of setoff against the moneys, securities or other property of Guarantors given to Bank by law, Bank shall have a lien upon and a right of setoff against all moneys, securities and other property of Guarantors now or hereafter in the possession of or on deposit with Bank, whether held in a general or special account or deposit, or for safekeeping or otherwise; and every such lien and right of setoff may be exercised without demand upon or notice to Guarantors. No lien or right of setoff shall be deemed to have been waived by any act or conduct on the part of Bank, or by any neglect to exercise such right of setoff or to enforce such lien, or by any delay in so doing; and every right of setoff and lien shall continue in full force and effect until such right of

setoff or lien is specifically waived or released by an instrument in writing executed by Bank.

In Witness Whereof the undersigned Guarantor has executed this guaranty this 13th day of November, 1942.

/s/ HOWARD B. MORROW.

[Endorsed]: Filed May 4, 1945. [5]

[Title of District Court and Cause.]

MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM

Defendant moves the court to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted in that the alleged cause of action being one based upon a guaranty cannot be properly maintained since the primary obligation upon which it is based is not due and payable, as more particularly appears from the affidavit of Jesse W. Curtis, Jr., attorney for the defendant attached hereto as Exhibit "A".

Dated this 8th day of January, 1946.

JESSE W. CURTIS, JR., and
KENNETH R. HENRY,

By /s/ JESSE W. CURTIS, JR.,
Attorneys for Defendant.

Received a copy of the within Motion this 11th day of Jan. 1946.

CHARLES H. CARR,
United States Attorney.
WM. W. WORTHINGTON,
Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 11, 1946. [7]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of San Bernardino—ss.

Jesse W. Curtis, Jr., being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice in all the courts of the State of California, and in the District Court of the United States in and for the Southern District of California, Central Division;

That he is now and has been at all times since prior to November 13, 1942 the attorney for defendant herein; that affiant represented the defendant throughout the entire transaction in which the guaranty marked Exhibit "I" and made a part of the complaint was executed;

That the primary indebtedness referred to in the complaint of the Morrow Aircraft Corporation to the American [8] National Bank of San Bernar-

dino was secured among other things by a chattel mortgage upon all tools, fixtures, equipment, patents and patent rights;

That subsequent to the execution of the said guaranty and on the 19th day of January, 1943, the Morrow Aircraft Corporation, of which the defendant was, and is, president and a major stockholder, said Morrow Aircraft Corporation being the principal debtor underlying the guaranty herein sued upon, entered into a Joint-Adventure Agreement with Fritz Ziebarth which provided among other things that the Morrow Aircraft Corporation would obtain the written consent of the American National Bank of San Bernardino to forebear foreclosure or enforce any lien or claim upon or against any of the tools, fixtures, equipment, patents or patent rights or otherwise interfere with the possession or use thereof during the terms of the agreement; that a copy of said Joint-Adventure Agreement is attached hereto, marked Exhibit "A", and made a part hereof;

That concurrently with the execution of said Joint-Adventure Agreement and for good and valuable consideration the said American National Bank of San Bernardino duly executed a consent, waiver and agreement of indemnity wherein and whereby the said American National Bank of San Bernardino agreed among other things not to foreclose or enforce any lien or claim on or upon any of the tools, fixtures, equipment, patents or patent rights or otherwise interfere with the possession or use of said equipment during the existence of the

Joint-Adventure; that a copy of said consent, waiver and agreement of indemnity is attached hereto, marked Exhibit "B" and made a part hereof;

That said Joint-Adventure Agreement is still in effect and has never been dissolved, terminated or discontinued; [9] that the effect of the consent, waiver and agreement of indemnity hereinbefore referred to was to extend the due date of the note beyond the termination of the Joint-Adventure;

That since no action can yet be instituted against the principal debtor, this action against the guarantor is improper and should be dismissed.

Dated this 8th day of January, 1946.

/s/ JESSE W. CURTIS, JR.

Subscribed and sworn to before me this 8th day of January, 1946.

[Seal] RUTH SHILLING,
Notary Public in and for said County and State.

EXHIBIT "A"

JOINT ADVENTURE AGREEMENT

This Agreement, made and entered into as of the 19 day of January, 1943, By and Between Fritz Ziebarth, an individual whose residence is Reno, Nevada, hereinafter referred to as "Ziebarth," and The Morrow Aircraft Corporation, a California corporation, whose offices are at Rialto, California, hereinafter referred to as "Morrow,"

Witnesseth:

Whereas, Morrow has designed various equip-

ment and appliances deemed valuable by the United States War Department for use in connection with the manufacture of airplanes, and has entered into certain uncompleted contracts with various aircraft corporations for the manufacture and delivery of such equipment, which are represented by various purchase orders, a true list and general description of which is attached hereto as Exhibit "A"; and

Whereas Morrow is financially unable to complete said contracts, and is being pressed by the Army, and the purchasers of said equipment, for its immediate delivery, and is in danger of losing the entire benefits of said contracts, as well as all of its own tools and operating equipment by foreclosure of various existing mortgages unless it can obtain immediate financial assistance; and

Whereas, Morrow and Ziebarth, under date of November 30, 1942, have entered into a co-adventure agreement, with respect to the manufacture of five expendable, plywood tanks for airplanes, in connection with an order from the War Department of the United States, and are desirous of amending said contract so as to make it amendable to all of the terms and conditions hereof; and

Whereas, Morrow is heavily indebyed to the American National Bank of San Bernardino, hereinafter referred to as "The Bank," for moneys heretofore advanced, and has executed numerous chattel mortgages and assignments to The Bank, as security for said advances; and

Whereas, it is the purpose of Ziebarth and Morrow to enter into a Joint-Adventure, subject to

the terms hereof, for the manufacture of sufficient equipment and parts to carry out the unfulfilled portions of such of the various purchase orders and contracts as may be determined advisable by Ziebarth, as herein provided, and to manufacture and construct such additional equipment and parts as may be necessary to carry out any and all extensions of such existing contracts and/or purchase orders, and any additional contracts or purchase orders of similar equipment, as may be required by the United States Government, in connection with its prosecution of the present war, either directly or indirectly through other aircraft manufacturing concerns; [11]

Now, Therefore, it is agreed by and between Ziebarth and Morrow, as of the date hereof, that they do form and enter into a Joint-Adventure, under the name and style of Morrow Aircraft-Ziebarth Joint-Adventure," for the sole and exclusive purpose of manufacturing and delivering, director or indirectly, to the United States Government, and the various aircraft concerns mentioned in the contracts and purchase orders hereinafter mentioned, and likewise, subject to the written consent of Ziebarth, any extensions of said existing orders, and any new contracts concerning such equipment or similar equipment and appliances which may be awarded hereafter to the Joint-Adventure.

Ziebarth shall have sixty (60) days from and after the effective date of this agreement within which to determine and designate which, if any, of

the various existing purchase orders described in Exhibit "A" shall be completed by the Joint-Adventure. The purpose of this paragraph is to permit Ziebarth to ascertain and determine the actual cost of manufacturing and delivering the various items of equipment covered by said purchase orders and to negotiate for an increase or adjustment in the sale price of any such equipment with the vendee thereof where deemed advisable. Pending such sixty (60 day period or until five (5) days' written notice of the rejection of any specific purchase order or orders by Ziebarth to Morrow and The Bank, the Joint-Adventure will endeavor to manufacture and deliver a sufficient quantity of such equipment to meet current delivery demands. The Joint Adventure shall in no wise be obligated to continue production of any equipment called for in any of the existing purchase orders after five (5) days from the giving of said written notice of rejection, and after said sixty (60) day period, the Joint-Adventure shall be obligated to manufacture and deliver only such remaining equipment as may be called for in connection with any such existing purchase orders (or modifications thereof) referred to in Exhibit "A" as shall have been specifically approved or accepted in writing by Ziebarth.

It is agreed that the term of said Joint-Adventure shall commence upon the furnishing by Morrow and The Bank of the indemnities and waivers, as hereinafter referred to, and shall expire upon the termination of all contracts, and the fulfillment of any purchase orders, accepted by Ziebarth in behalf of

the Joint-Adventure, and the winding up of its affairs. In this respect, it is further understood and agreed that said Joint-Adventure may be terminated by Ziebarth, after the period of one year, by giving thirty (30) days' written notice to the other party hereto, and the same may be terminated by Morrow, at the end of two (2) years, upon the giving of written notice to such effect to the other party hereto.

Morrow agrees to furnish any and all tools, facilities, fixtures, equipment, patents or patent rights now in its possession, or under its control, for use by the Joint-Adventure, without any rental or charge of any kind, except as herein provided, for the entire period of said Joint-adventure, it being understood however, that the title to said property shall remain, and be, the property of Morrow, except insofar as the same has been mortgaged or pledged to The Bank, Morrow will obtain forthwith the written consent of The Bank for the use, by the Joint-Adventure, of all of the said tools, fixtures, or equipment, patents or patent rights, and will further obtain an agreement from The Bank to forebear foreclosing or enforcing any lien or claim upon, or against, any of the said tools, fixtures or equipment, patents or patent rights, or otherwise interfering with the possession or use thereof during the term of this agreement, except with the consent of Ziebarth. [12]

Morrow also agrees to make available to the Joint-Adventure any rights acquired by virtue of that certain agreement for the manufacture of ply-

wood airplane parts with the Superior Ladder Company, a corporation, under date of June 13, 1942.

Morrow will insure and keep insured against loss by fire, in adequate amounts, all said tools, fixtures or equipment, and all premiums thereon hereafter becoming due shall be advanced by the Joint-Adventure and repaid to the Joint-Adventure prior to distribution of profits to Morrow. In the event of any loss or damage by fire, any insurance recovery shall be used for the replacement, or repair, of destroyed or damaged equipment as then required by the Joint-Adventure, and any overplus remaining shall be paid to Morrow, or its assigns. All such equipment so replaced or repaired shall be and remain the property of Morrow.

Ziebarth agrees to advance all necessary operating capital, to run and operate the equipment and facilities, so furnished by Morrow and to complete such of the aforementioned unfulfilled contracts, as well as any extensions thereof, or other contracts as may be expressly approved by Ziebarth, and for the furnishing of equipment, or otherwise accomplishing the purpose of this Joint-Adventure, as above stated. In lieu of advancing money, Ziebarth may, at his option, purchase and furnish any specific equipment needed for the operations of the Joint-Adventure, in which event the title thereto shall remain in his name, until sufficient funds are available from the operations of the Joint-Adventure, to reimburse him for the purchase price thereof, whereupon title thereto shall be trans-

ferred to the Joint-Adventure. In the event of the termination of this Joint-Adventure, prior to the payment to Ziebarth of the purchase price of any equipment the Joint-Adventure shall pay to Ziebarth a reasonable rental for the use of said equipment.

It is agreed that Exhibit "A" hereto attached correctly sets forth the number of each existing purchase order, the number and nature of items ordered, the vendee, and the number of items (or the contract price of materials) not yet completed or delivered by Morrow. It is distinctly understood and agreed that this Joint-Adventure shall apply only to such of the undelivered items referred to in said existing contracts, or orders, as may be delivered by the Joint-Adventure, and that Morrow, or its assigns, shall be entitled to receive such unpaid sums as may be due according to the unit price as specified in the order or contract, for such units as have actually been delivered by Morrow and that the Joint-Adventure is to receive all moneys due on account of any deliveries made by it as herein provided. Morrow agrees to execute an assignment of all its right, title and interest in and to the unperformed portions of said contracts, or orders, and the proceeds therefrom to the Joint-Adventure, insofar as the same may be feasible, or possible, and further, agrees to execute a power of attorney to Ziebarth, or his agent, so as to permit the endorsement of any checks, or warrants representing payment, or payments, on account of deliveries made by the Joint-Adventure so that the

same may be deposited in the Joint-Adventure bank account, and Morrow will obtain from the Bank a waiver of any and all rights it may have in and to any of the aforesaid proceeds from deliveries made by the Joint-Adventure, and an agreement that the same may be deposited in the Joint-Adventure account, pursuant to the terms thereof. [13]

All moneys payable to the Joint-Adventure, under the terms hereof, shall be deposited in the Citizens' National Trust and Savings Bank of Los Angeles, Los Angeles, California, and/or The American National Bank of San Bernardino, in an account entitled "Morrow Aircraft-Ziebarth Joint-Adventure," and shall be paid out only upon the written order of Ziebarth, or other person, or persons personally authorized by him, in writing, so to do. The funds of the Joint-Adventure shall be used only for the purpose of paying the costs and expenses of its operations, and in re-payment to Ziebarth of funds, or property, advanced or furnished by him, and in distribution of profits to the parties.

In the conduct of the Joint-Adventure operations, Morrow agrees to cooperate in the direction of all engineering, designing, and construction work, and to furnish the Joint-Adventure with all engineering data, designs, or information now in its possession, which may be of assistance in accomplishing the purpose of the Joint-Adventure.

Ziebarth shall have complete control of the hiring and firing of all personnel, the fixing of all salaries, the purchase of all equipment, expenditure of all moneys, accounting, preparation of statements, and

the general operation of the business of the Joint-Adventure. Ziebarth may insure the operations provided for in this agreement against loss by reason of damage to persons or property by either Ziebarth or Morrow in the operation of the business. The cost of such insurance shall be considered as one of the necessary costs in the conduct of the operations. The sole interest of Morrow in the assets of the Joint-Adventure shall be its right to participate in the profits if any and to receive such share of the property of said Joint-Adventure as may remain after the payment of all its obligations upon the termination of this Joint-Adventure. Morrow shall have no right to incur any obligations, in behalf of said Joint-Adventure, or to enter into any negotiations whatever in its behalf, without the written consent, or approval, of Ziebarth. The profits arising from the Joint Adventure and the Property remaining upon the termination of this Joint-Adventure shall be divided fifty-one per cent (51%) to Ziebarth, and forty-nine per cent (49%) to Morrow, or its assigns.

Morrow or The Bank shall cause to be deposited in a special account entitled "Morrow Aircraft-Ziebarth, Trustee," with The Bank the sum of \$25,000.00 to indemnify Ziebarth as against any loss or expense which may be sustained by him in connection with the completion of any existing purchase orders described in Exhibit "A" (except the War Department contract for the manufacture of plywood tanks) subject to the following terms and conditions:

(a) The term "loss" as herein used shall be construed to mean the difference, if any, between the actual cost of manufacturing and delivering the undelivered parts or equipment and the amount actually received by the Joint-Adventure for such parts or equipment. The term "actual cost" shall include all costs, including overhead and direct costs, which overhead and indirect costs, however, shall not exceed one hundred per cent of the direct labor used in manufacturing and delivering said equipment. Said loss shall be computed only after the completion by Ziebarth of all existing orders accepted by him as herein provided, and shall likewise refer to any operation in connection with the existing contracts which may be partially completed by Ziebarth but later rejected by him during the sixty-day period as aforesaid. [14]

(b) The amount of said fund which shall be available to Ziebarth by way of indemnification shall be in direct proportion to the value of deliveries made by the Joint-Adventure on account of the unfulfilled portions of said existing purchase orders—that is to say, the total amount of indemnification payable out of said fund shall be an amount equal to the product obtained by multiplying the sum of \$25,000.00 by the fraction obtained by using as the denominator the total value of undelivered items called for in said existing purchase orders as of the effective date of this agreement and as

the numerator the total value of deliveries actually made by the Joint-Adventure.

(c) Funds may be withdrawn from said account by Ziebarth upon his filing with the bank a certificate showing the actual loss sustained as herein provided and supported by data showing the cost of production, the total amount of deliveries and the amount received therefor.

(d) Any funds remaining in said account after payment to Ziebarth of such funds as he may be entitled to on account of losses sustained shall belong to The Bank.

Morrow agrees to obtain releases from any and all labor contracts, or bonus arrangements, that may be in existence, in connection with any of the contracts, or orders referred to in Exhibit "A," it being understood and agreed that the Joint-Adventure shall not be liable on account of any such contracts. The Joint-Adventure shall not be liable for any existing obligations on the part of Morrow, and Morrow hereby agrees to indemnify and hold harmless the Joint-Adventure and Ziebarth as against any and all loss or expense incurred by either on account of any existing obligations, social security taxes, unemployment taxes, income taxes, sales tax, and the like, insofar as said obligations may be, or become, a lien, or charge, or claim against the assets of the Joint-Adventure, or Ziebarth, by reason of this agreement, or any operations pursuant thereto, or otherwise, Morrow, likewise, agrees to indemnify Ziebarth, and the Joint-Adventure, as against any and all costs and expenses, including attorney's fees,

which may be reasonable incurred in defendant, prosecuting, or appearing in any action, or proceeding, which may be brought by, or against, either of them or their property on account of any such obligations, taxes, or claims. In this connection Morrow likewise agrees to cause to be deposited with the Bank an additional sum of \$25,000.00 in a special fund which said sum shall be used by said Bank as a deposit to secure the faithful performance of any and all obligations of Morrow in this paragraph set forth and described, including any obligation to Ziebarth arising by reason of the foregoing indemnities is not paid, the same may be charged against and satisfied out of any profit of said Joint-Adventure to which Morrow may become entitled.

Morrow agrees to sell to the Joint-Adventure all usable material inventories, now in its possession, at the cost price thereof, which amounts are to be paid out of the funds of the Joint-Adventure.

Upon the termination of this Joint-Adventure all fixtures and property, the title to which stands in the name of either of the parties hereto, shall be held by such party, free and clear from any and all claims of either party or of the Joint-Adventure, and all property and assets of the Joint-Adventure which remain, after reimbursing Ziebarth for all moneys advanced to said Joint-Adventure, and the reasonable rental value of any equipment furnished by him, shall be divided between the parties hereto, in accordance with their respective interests. [15]

Neither Ziebarth, nor Morrow, shall receive any

compensation for services rendered to, or on account of, the operations of the Joint-Adventure. The salaries and compensation of all labor and personnel, engaged in the undertaking shall be paid by the Joint-Adventure.

All records and accounts of operations of the Joint-Adventure shall, at all times, be open to the inspection of each of the parties, and their representatives, and each of the parties shall be kept fully informed as to all of the operations of the Joint-Adventure. It is agreed that, at the end of each six months' period, or such other period as may be agreed upon, there shall be an accounting, covering operations during said period, and a determination and distribution of any profits realized therefrom. No profits, however, shall be distributed until Ziebarth has been repaid any and all sums advanced by him, and for any equipment purchased by him for use in connection with the operations of the Joint-Adventure.

Morrow agrees to supply the Joint-Adventure with a complete inventory of all facilities, equipment, tools, fixtures, and patents and also a complete inventory of all usable materials on hand, together with the costs of such materials, within five (5) days after the execution of this agreement.

Morrow will obtain from the Bank an agreement to subordinate any and all rights it may have in and to the proceeds from the undelivered portions of any purchase orders or contracts now existing or hereafter obtained, to the rights of the Joint-Adventure as herein provided.

This agreement shall supersede the aforesaid agreement of November 30, 1942, between Morrow and Ziebarth and shall control in all respects, where inconsistent therewith, except as to the indemnification deposit as heretofore stated.

It is expressly understood and agreed that the undertakings hereinabove recited shall constitute a Joint-Adventure, and will be strictly limited, in its operations, to the purposes for which it is entered into, and that neither party shall permit any extension of its operations beyond the limits herein prescribed, under any circumstances whatsoever.

In Witness Whereof, the parties hereto have caused this agreement to be executed the day and year first above written.

FRITZ ZIEBARTH,
MORROW AIRCRAFT
CORPORATION,

By: F. A. MORROW,
V. Pres.

By: LUCIEN H. OUTMAN,
Sec'y. [16]

[Exhibit "B," hereto attached, is identical with Exhibit "B" attached to Answer, and is set forth in full on pages 37 to 40.]

Received a copy of the within affidavit this 11th day of Jan., 1946.

/s/ CHAS. H. CARR,
U. S. Atty.

/s/ WM. WORTHINGTON,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 11, 1946. [20]

At a stated term, to wit: The February Term, A.D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 4th day of February, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Ben Harrison,
District Judge.

[Title of Cause.]

MINUTE ORDER DENYING MOTION
TO DISMISS

This cause coming on for hearing motion of the defendant to dismiss this action on the ground that the complaint fails to state a claim, pursuant to notice, motion, and affidavit, filed January 11, 1946; Wm. W. Worthington, Assistant U. S. Attorney, appearing as counsel for the Government; Jesse W. Curtis, Jr., Esq., appearing as counsel for the defendant:

The Court makes a statement and orders that the said motion of defendant to dismiss is denied and that twenty days is allowed to answer the complaint.

[Title of District Court and Cause.]

ANSWER

In answer to plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

Answering Paragraph I thereof, defendant admits that he is within the jurisdiction of the above entitled court, but except as expressly admitted herein, he denies generally and specifically each and every allegation contained in said paragraph.

II.

Admits all the allegations contained in Paragraph II of said complaint.

III.

In answer to Paragraph III thereof, the defendant alleges that he has no information or belief on the subject of the assignment of said promissory note to the plaintiff by the American National Bank of San Bernardino, and basing his denial on this ground, denies that plaintiff became or now is the owner or holder of the promissory note. Except as to those matters denied upon [22] lack of information and belief, defendant denies generally and specifically each and every allegation therein contained.

IV.

Answering Paragraph IV of plaintiff's complaint, defendant alleges that heretofore and on November 13, 1942, he made, executed and delivered to the American National Bank of San Bernardino, a cer-

tain guarantee wherein and whereby this defendant purported to guarantee a certain indebtedness of Morrow Aircraft Corporation to said bank, evidenced by a promissory note of even date therewith in the face amount of \$225,000.00, said guarantee, however, being limited by the terms thereof to the sum of \$100,000.00. A copy of said guarantee is annexed to plaintiff's complaint herein, marked Exhibit "I," to which reference is hereby made. Except as expressly admitted, defendant denies generally and specifically each and every allegation contained in said paragraph.

V.

Answering Paragraph V of plaintiff's complaint, defendant alleges that he has no information or belief on the subject sufficient to enable him to answer the allegations therein contained, and basing his denial upon that ground, denies generally and specifically each and every allegation therein contained.

VI.

Answering Paragraph VI of plaintiff's complaint, defendant denies that there is now due or owing from the defendant to the plaintiff herein under the terms or provisions of said guarantee or otherwise, the sum of \$100,000.00, or any other sum or sums whatever.

For a Further, Separate and Second Defense, Defendant Alleges as Follows:

I.

Concurrently with the execution of the said prom-

issory note [23] by Morrow Aircraft Corporation referred to in Paragraph II of plaintiff's complaint, and of even date therewith and as security therefor, the said Morrow Aircraft Corporation executed a chattel mortgage covering all furniture, fixtures, machinery, equipment, tools, tooling and accessories more particularly described therein. Annexed hereto, marked Exhibit "A," and made a part hereof is a true and correct copy of the said note and chattel mortgage.

II.

That on the 13th day of November, 1942, the defendant executed the guarantee referred to in plaintiff's complaint, by the terms of which the defendant purportedly guaranteed the payment of a certain note therein described.

III.

That on the 19th day of January, 1943, the Morrow Aircraft Corporation entered into a Joint Adventure Agreement with Fritz Ziebarth, which provided among other things that Morrow Aircraft Corporation would deliver to the new joint adventure for use in the operations contemplated by said joint adventure certain of its assets including the furniture, fixtures, machinery and equipment, tools, tooling and accessories described in the aforementioned chattel mortgage; that a true and correct copy of the said joint adventure agreement is annexed to the affidavit of Jesse W. Curtis, Jr., on file herein and to which reference is hereby made.

IV.

On the 19th day of January, 1943, the American National Bank of San Bernardino, for good consideration, executed a "Consent, Waiver and Agreement of Indemnity," providing among other things that said bank would not enforce its lien or claim upon the furniture, fixtures, machinery and equipment, tools, tooling and accessories described in said chattel mortgage during the existence of the said joint adventure. A true and correct copy of said "Consent. Waiver and Agreement of Indemnity" is [24] annexed hereto, marked Exhibit "B" and made a part hereof.

V.

That at the time of the commencement of this action, said Joint Adventure agreement was still in full force and effect and had never been dissolved, terminated or discontinued. At the time this action was commenced, no cause of action existed upon said promissory note against the Morrow Aircraft Corporation; the primary debtor, nor did any cause of action exist upon the guaranty as against this defendant.

For a Further, Separate and Third Defense, the Defendant Alleges as Follows:

I.

Defendant hereby incorporates Paragraphs I, II, III, and IV of his further, separate and second defense herein the same as if fully set forth.

II.

That the Consent, Waiver and Agreement of Indemnity hereinbefore referred to materially altered and extended the due date of the promissory note; that said alteration and extension was entered into without the knowledge or consent of the defendant, and that by reason of such alteration and extension the defendant is exonerated from the payment of the guarantee set forth in plaintiff's complaint.

Wherefore, defendant prays that plaintiff take nothing by its action and that the defendant be awarded his costs of suit and such other relief as to the court may seem just.

/s/ JESSE W. CURTIS, JR.,
Attorney for Defendant. [25]

EXHIBIT "A"

MORTGAGE OF CHATTELS

This Mortgage, made the 18th day of November, 1942, by Morrow Aircraft Corporation, a California corporation, of the City of Rialto, County of San Bernardino, State of California, by occupation Manufacture of aircraft pilot seats and sub-assemblies, herein called Mortgagor, and The American National Bank of San Bernardino of City of San Bernardino, County of San Bernardino, State of California, by occupation a National Banking Association, herein called Mortgagee,

Witnesseth:

That the Mortgagor mortgages to the Mortgagee

all the following described personal property, together with the natural increase and the products thereof, if any, situated in the City of Rialto, County of San Bernardino, State of California, and described as follows, to wit:

All furniture, fixtures, machinery and equipment, tools, tooling, and accessories now owned or hereafter acquired by the Mortgagor and used in connection with the operation of the manufacturing plant belonging to the Mortgagor, and situate in and upon the premises known and described as 101, 104, 109, 114, 116, 118, 128, 131, 135, 137 and 210 South Riverside Avenue, City of Rialto, County of San Bernardino, State of California.

Inventory of all such furniture, fixtures, machinery and equipment, tools and tooling and accessories now owned by the Mortgagor being annexed hereto. [26]

as security for the payment to Mortgagee of Two Hundred Twenty-five thousand & No/100 Dollars (\$225,000.00), with interest thereon according to the terms of Mortgagor's promissory note of even date herewith, in words and figures as follows:

San Bernardino, California
November 18, 1942.

Promissory Note—\$225,000.00

On Demand, or if no demand is made, then on or before November 15, 1943, for value received, the

undersigned corporation promises to pay to the order of The American National Bank of San Bernardino, California, a National Banking Association, Two Hundred Twenty-five Thousand & No/100 Dollars, with interest thereon from date until paid, at the rate of Five per cent per annum, payable quarterly, and if not paid when due, to be added to the principal and bear like interest.

The makers and endorsers of this note hereby waive diligence, demand, protest and notice, and in case suit is instituted to collect this note, agree to pay reasonable attorney's fees. This note is payable in lawful money of the United States at the American National Bank of San Bernardino, California.

**MORROW AIRCRAFT
CORPORATION,**

By

P.O.....

By

P.O.....

This mortgage also secures: (a) Any and all renewals of said promissory note; (b) the repayment of all sums and amounts that may be necessarily advanced or expended by Mortgagee for the maintenance or preservation of the mortgaged property, or any part thereof; (c) to the maximum extent and amount of Two Hundred Twenty-Five Thousand & No/100 Dollars (\$225,000.00), any and all other sums that may hereafter be advanced by Mortgagee to or for the benefit of Mortgagor, any and all other expenditures that may hereafter be made by Mort-

gagee pursuant to the provisions hereof or for the benefit of or at the instance of Mortgagor, and any and all other indebtednesses and obligations of Mortgagor to Mortgagee that may hereafter be incurred.

Mortgagor hereby warrants that he is the sole owner and in possession of all of said mortgaged property and that said property is free and clear of all liens, encumbrances and adverse claims, with the exception of the lien of this mortgage. Mortgagor agrees to appear in and defend any and all actions and proceedings affecting title to said mortgaged property, or any part thereof, or affecting the security interest of Mortgagee therein.

Mortgagor hereby agrees: to do all acts which may be necessary to maintain, preserve and protect said mortgaged property and to keep said property in good condition and repair; not to commit or permit any waste of said property; to keep said property separate and always capable of identification; to pay, at least ten (10) days before delinquency, all taxes, assessments and liens now or hereafter imposed upon said property; to provide, maintain and deliver to Mortgagee fire and other insurance policies covering said property in amounts and companies satisfactory to Mortgagee and with loss payable to Mortgagee; not to sell, contract to sell, lease, encumber, dispose of or permit the consumption of all or any part of said property, and not to remove the same from the premises on which it is now located without the written consent of Mortgagee.

If Mortgagor fails to make any payment or do any act as herein required, then Mortgagee, but without obligation so to do, and without notice to or demand upon Mortgagor, may make such payments and do such acts as Mortgagee may deem necessary to protect its security interest in said property, Mortgagee being hereby authorized (without limiting the general nature of the authority hereinabove conferred) to take possession of said property, or any part thereof, and to pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of Mortgagee appears to be prior or superior to the lien of this mortgage, and in exercising any such powers and authority to pay necessary expenses, employ counsel and pay the reasonable fees. Mortgagee's determination [27] as to whether or not Mortgagor has failed to make any payment or do any act as herein required shall be final and conclusive. Mortgagor hereby agrees to repay immediately, and without demand, all sums so expended by Mortgagee pursuant to the provisions of this paragraph, with interest from date of expenditure at the rate of five per cent (5%) per annum.

In the event there shall hereafter be a decrease in the value of said mortgaged property, Mortgagor agrees to give to Mortgagee further security or to make payments on account to Mortgagee in an amount or to the extent sufficient to offset said decrease in value.

If Mortgagor shall default in the payment of any or all of the indebtednesses, obligations and liabilities

ties secured hereby, or shall default in the performance of any agreement herein contained, or if any or all of said property be hereinafter sold, leased, encumbered or otherwise disposed of, without the consent of Mortgagee, then Mortgagee, at its option, without demand upon or notice to Mortgagor, may declare all indebtednesses, obligations and liabilities secured hereby to be immediately due and payable, and Mortgagee may proceed to foreclose this mortgage according to law, or may, at its option, and it is hereby empowered so to do, with or without foreclosure action, enter upon the premises where said property, or any part thereof, may be and take possession thereof; and remove or sell and dispose of said property, or any part thereof, at public or private sale, without any previous demand of performance or notice to Mortgagor of any such sale, notice of sale and demand of performance and all other notices and demands being hereby expressly waived by Mortgagor. Said property, or any part thereof, may be sold in one or more lots, and at one or more sales, which may be held on different days and which need not be held within view of the property being sold. Mortgagee shall deduct and retain from the proceeds of such sale or sales all costs and expenses paid or incurred in the taking, removal, and sale of said property, including any reasonable attorneys' fees incurred or paid by Mortgagee; the balance of the proceeds shall be applied by Mortgagee upon the indebtedness, obligations and liabilities secured hereby, in such order and manner as the Mortgagee may determine, and the surplus, if

any, shall be paid to the Mortgagor or to the person or persons lawfully entitled to receive the same.

In the event that an action be brought to foreclose this mortgage, there shall be due from Mortgagor to the plaintiff therein, immediately upon the commencement of such action, an attorneys' fee of One Hundred Dollars (\$100.00), and, in the event that the action goes to judgment, a further attorneys' fee, equal to five per cent (5%) of the amount found due, which sums Mortgagor agrees to pay, and shall be included in the judgment in said action.

In any action of foreclosure plaintiff shall be entitled to the appointment of a Receiver, without notice, to take possession of all or any part of said mortgaged property and to exercise such powers as the Court shall confer upon him.

At any sale or sales made under this mortgage, or authorized herein, or at any sale or sales made upon foreclosure of this mortgage, Mortgagee (or its representative) may bid for and purchase any property being sold, and, in the event of such purchase, shall hold such property thereafter discharged of all rights of redemption.

Mortgagor hereby assigns to Mortgagee all sums now or hereafter payable to Mortgagor as the proceeds of sale of said mortgaged property, or any part thereof, and any and all sums now or hereafter payable to Mortgagor under the terms of any agreement for the sale or marketing of said property, or any part thereof; provided, however, that nothing in this paragraph contained shall be construed to waive or in any way affect the lien of this

mortgagee or the limitations, hereinabove expressed, upon the Mortgagor's right to deal with said property, without Mortgagee's written consent.

Mortgagee shall be entitled to enforce any indebtedness, obligation or liability secured hereby and to exercise all rights and powers hereby conferred, although some or all of the indebtednesses, obligations and liabilities secured hereby are now or shall hereafter be otherwise secured. Mortgagee's acceptance of this mortgage shall not affect or prejudice Mortgagee's right to realize upon or enforce any other security now or hereafter held by Mortgagee, and Mortgagee shall be entitled to exercise all rights of set-off and of banker's lien to the same effect and in the same manner as if this mortgage had not been given.

Any Mortgagor who is a married woman and who has joined in the execution of the said promissory note hereinabove set forth hereby expressly agrees to the liability of her separate property for all the indebtednesses and obligations hereby secured, but without hereby creating a present or any lien or charge thereon.

The words "Mortgagor" and "Mortgagee," as used herein, shall be construed to include the heirs, legatees, devisees, administrators, executors, successors and assigns of Mortgagor and Mortgagee. This mortgage shall bind and inure to the benefit of said third persons. Whenever the context so requires, the masculine gender includes the feminine or neuter, the singular number includes the plural and vice versa.

In Witness Whereof, Mortgagor has executed these presents the day and year first above written.

[Seal]

MORROW AIRCRAFT
CORPORATION,

By HOWARD B. MORROW

By FRANCES MASIOKUS. [28]

EXHIBIT "B"

CONSENT, WAIVER, AND AGREEMENT
OF INDEMNITY

In consideration of the terms and conditions of that certain Joint-Adventure Agreement, entered into as of the 19th day of January, 1943, between Fritz Ziebarth, herein referred to as Ziebarth, an individual, of Reno, Nevada, and The Morrow Aircraft Corporation, a California corporation, of Rialto, California, hereinafter referred to as Morrow, and the execution and delivery of a certain assignment by Morrow, contemporaneously herewith, the undersigned, the American National Bank of San Bernardino, hereinafter referred to as The Bank, hereby consents to the use of the various equipment, tools, facilities, fixtures, patents, and patent rights, now in the possession of Morrow, or under its control by the Joint-Adventure, as provided in said Joint-Adventure Agreement, and further, agrees not to foreclose, or enforce any lien or claim, on, or upon, any of said tools, fixtures, equipment, patents, or patent rights, or otherwise interfere with the possession or use of said equip-

ment during the existence of said Joint-Adventure, except by the written consent of Ziebarth.

The undersigned, likewise, waives any rights it may have in and to the proceeds from the unperformed portions of any of the contracts, or orders, described in Exhibit "A," of said Joint-Adventure Agreement, that are subject to said Joint-Adventure, and hereby consents to the deposit of said proceeds, from deliveries made after the effective date of said agreement, in said Joint-Adventure account.

The undersigned certifies that it now has on deposit, in an account entitled "Morrow Aircraft-Ziebarth, Trustee," the sum of \$25,000.00, which amount is to be used to indemnify Ziebarth as against any loss or expense, which may be sustained by him, or the Joint [30] Adventure, in connection with the completion of any existing purchase orders, described in Exhibit "A," (except the War Department contract for the manufacture of plywood tanks), subject to the following terms and conditions:

(a) The term "loss," as herein used, shall be construed to mean the difference, if any, between the actual cost of manufacturing and delivering the undelivered parts or equipment, and the amount actually received by the Joint-Adventure for such parts or equipment. The term "actual cost" shall include all costs, including overhead and indirect costs, which overhead and indirect costs, however, shall not exceed one hundred percent of the direct labor used in manufacturing and delivering said

equipment. Said loss shall be computed only after the completion by Ziebarth of all existing orders accepted by him as provided in said Joint-Adventure Agreement, and shall likewise refer to any operations in connection with existing contracts which may be partially completed by Ziebarth but later rejected by him during the sixty-day period as therein provided.

(b) The amount of said fund which shall be available to Ziebarth by way of indemnification shall be in direct proportion to the value of deliveries made by the Joint-Adventure on account of the unfulfilled portions of said existing purchase orders—that is to say, the total amount of indemnification payable out of said fund shall be an amount equal to the product obtained by multiplying the sum of \$25,000.00 by the fraction obtained by using as the denominator the total value of undelivered items called for in said existing purchase orders as of the effective date of this agreement and as the numerator the total value of deliveries actually made by the Joint-Adventure.

(c) Funds may be withdrawn from said account by Ziebarth upon his filing with the bank a certificate showing the actual loss sustained as herein provided and supported by data showing the cost of [31] production, the total amount of deliveries and the amount received therefor.

(d) Any funds remaining in said account after payment to Ziebarth of such funds as he may be entitled to on account of losses sustained shall belong to The Bank.

The undersigned, likewise, certifies that it has on deposit the additional sum of \$25,000.00, in an account entitled "Morrow Aircraft Corporation Special Account," which money will be used for the purpose of paying existing liabilities of Morrow, such as social security taxes, unemployment taxes, income taxes, sales taxes, and any other obligations which may become a lien or charge or claim against the assets of the Joint-Adventure, or Ziebarth, and to further secure the performance by Morrow of his obligations to indemnify Ziebarth as provided in that paragraph of the said Joint-Adventure Agreement commencing at Line 5, Page 9, thereof and relating to payment by Morrow of existing obligations, taxes and claims.

Dated this 19th day of January, 1943.

THE AMERICAN
NATIONAL BANK
OF SAN BERNARDINO.

By /s/ EARNIST McCOOK,
Cash. [32]

State of California,
County of San Bernardino—ss.

Howard B. Morrow being by me first duly sworn, deposes and says that he is the Defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ HOWARD B. MORROW.

Subscribed and sworn to before me this 12th day of March, 1946.

[Seal] /s/ RUTH SHILLING,

Notary Public in and for said County and State of California. [33]

Received copy of the within Answer this 13th day of March, 1946.

CHAS. H. CARR,

United States Attorney.

/s/ WM. W. WORTHINGTON,

Assistant U. S. Attorney.

[Endorsed]: Filed March 13, 1946. [34]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated by and between the parties hereto through their respective attorneys, that the above-entitled cause may be reopened for the reception of further evidence.

Dated: January 7, 1947.

/s/ JAMES M. CARTER,

U. S. Attorney.

/s/ CHARLES H. VEALE,

Asst. U. S. Atty.,

Attorney for Plaintiff.

JESSE W. CURTIS, JR.,

By KENNETH R. HENRY,

Attorney for Defendant.

[Endorsed]: Filed March 4, 1947. [35]

[Title of District Court and Cause.]

NOTICE BY THE CLERK

James M. Carter, U. S. Attorney; Charles H. Veale, Asst. U. S. Atty., 600 Federal Building, Los Angeles 12, Calif. Jesse W. Curtis, Jr., Attorney at Law, 415 Andreson Building, San Bernardino, Calif.:

You are hereby notified that the above-entitled cause was this day ordered this cause is set for April 4, 1947, 10 a.m., for further trial. Stipulation of counsel is filed this day.

Dated: Los Angeles, California, March 4, 1947.

EDMUND L. SMITH,
Clerk.

By MURRAY E. WISE,
Deputy Clerk. [36]

Accounting Exhibit No. 1

San Bernardino, California
January 10, 1943

American National Bank
San Bernardino, California

Gentlemen:

In our agreement with Frits Zeibarth, informing the Morrow Aircraft - Zeibarth joint-adventure, this bank will be required to make the following commitments:

1. Bank shall consent to the execution of the joint-adventure agreement by Morrow.
2. Bank shall consent to the use of all tools, fixtures, and equipment, patents and patent rights now in possession of Morrow by the joint-adventure and bank shall agree to forbear foreclosing or enforcing any lien or any claim upon or against any of the tools, fixtures or equipment, patents or patent rights, or otherwise interfering with the possession or use thereof during the term of the joint-adventure agreement except with the consent of Zeibarth.
3. Bank shall waive any and all rights it has in and to any of the proceeds from deliveries made after the effective date of this agreement upon existing purchase orders, and bank shall consent that the aforesaid proceeds may be disbursed to the joint-adventure account (you may provide, however, if you deem it advisable, that the foregoing waiver shall in no way affect any lien or claim of the bank upon any and all payments made by the joint-adventure to Morrow so long as Morrow is indebted to the bank.)
4. The bank shall represent that ^{there} has been deposited with it the sum of \$25,000. which it will use to pay any losses sustained by Zeibarth in completing the existing orders or contracts referred to in Exhibit "A" attached to the joint-adventure agreement.
5. The bank shall represent that there has been deposited with it an additional sum of \$25,000. from which it will pay any existing obligations on the part of Morrow Aircraft including social security taxes, unemployment taxes, income taxes, sales taxes, and the like, and any obligation which may hereafter arise on the part of Morrow to Zeibarth arising out of the indemnity provisions of the joint-adventure agreement wherein Morrow agrees to indemnify Zeibarth and the joint-adventure against any and all existing obligations, and wherein Morrow further agrees to indemnify Zeibarth and the joint-adventure against any and all expenses, including attorney's fees which may be reasonably incurred in defense or appearing in any action or proceeding which may be brought against either of them or their

** To be revised*
H. H. H.

2 COPIES TO BUREAU
104th

#2.

American Natl. Bank

1-10-43

property on account of any such obligations, taxes or claims.

As soon as we have these commitments, the joint-adventure agreement can be entered into.

Yours very truly,

MCROFT AIRCRAFT CORPORATION

By

Charles B. Maw resident

[Endorsed]; Filed Jan. 2, 1947



DEFENDANT'S EXHIBIT A

Office of Liaison Officer
Fiscal Division

Federal Reserve Bank Building
Los Angeles, California

December 2, 1942

Morrow Aircraft Corporation
Box 1029
Rialto, California

Attention Mr. Howard B. Morrow

Gentlemen :

In checking over the Morrow Aircraft file, I find I have never verified our oral conversation concerning Mr. Guy Goodwin's status.

As I told you and Miss Masiokus, Mr. Goodwin is being placed in charge of Morrow Aircraft by the banking institution, Federal Reserve Bank and the War Department, and is in complete charge of all Morrow Aircraft operations. He has authority to hire, fire, lower and raise salaries any way he sees fit, and his salary is set at \$400 per month with the understanding with me that when and if the company is placed on a paying basis, we will then consider him for a raise.

I have the utmost confidence in Mr. Goodwin's ability to work harmoniously with you and all the other Morrow personnel, but the War Department

is looking to him as the manager. It is not possible to have the two bosses on any job.

Very truly yours,

/s/ JAY L. TAYLOR,

Major, A.U.S. Liaison Officer,
Fiscal Division.

cc Mr. Goodwin
Mr. McCausland
American National Bank,
San Bernardino, California.

[Endorsed]: Filed April 4, 1947. [40]

In the District Court of the United States, Southern
District of California, Central Division

No. 4428-BH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD B. MORROW,

Defendant.

MEMORANDUM AGREEMENT

The United States sues as the assignee of a guaranty executed by the defendant in the amount of \$100,000.00. More than \$100,000.00 remains due and unpaid on the primary obligation.

The case presents two issues: First, when a contract of guaranty contains a recital to the effect

that it secures a note of even date therewith, is the guarantor exonerated because the note was actually executed five days later, even though the note and guaranty were executed as part of the same transaction? Second, if the defendant-guarantor were originally bound, did he consent to a modification in the security, or was he exonerated when the obligee contracted not to foreclose on the mortgage securing the note until the termination of a certain joint-adventure?

In November, 1942, the Morrow Aircraft Corp. (hereinafter called the Corporation), of which the defendant was the president and majority stockholder, needed money to carry on its business in the construction of airplane parts for the national defense. On November 13, 1942, the defendant entered into a contract of guaranty, agreeing to pay the American National Bank of San Bernardino (hereinafter called the Bank) or order, on demand, the indebtedness of the Corporation "evidenced by a promissory note of even date herewith, in the face amount of \$225,000.00," the defendant's liability not to exceed \$100,000.00. The loan was actually made sometime after November 18, 1942, and the promissory note of the Corporation was issued bearing that date. The note was secured by a chattel mortgage on almost all of the property of the Corporation, as well as all of the defendant's stock therein.

Later in November, 1942, the government placed one Guy L. Goodwin in the plant as manager. In January, 1943, the Corporation began negotiations

with one Ziebarth to enter into a joint-adventure for carrying out its contracts. Ziebarth would not close the transaction until the Bank, among other things, had agreed not to foreclose on its mortgage during the existence of the joint-adventure, except with his consent. On January 10, 1943, the defendant, in his capacity as president of the Corporation, signed a letter from him to the Bank, wherein Ziebarth's conditions were stated. This letter was prepared by the Bank preparatory to its execution of the waiver Ziebarth was demanding. On January 19, 1943, the Bank executed a "Consent, Waiver, and Agreement of Indemnity." and the joint-adventure was entered into on the same day. The joint-adventure was terminated in January, 1946. The note has been assigned by the Bank to the United States, and the unpaid balance exceeds \$100,000.00.

A guaranty cannot exist if there is nothing to guarantee. *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812. The defendant contends that since the note purportedly secured by the guaranty did not exist at the time of the execution of the guaranty, the guaranty is of no effect. A guaranty is a contract to answer for the debt of another, and if the debt does not exist, the guaranty cannot. [42]

But defendant admits that the guaranty was executed as part of the same transaction with the note. The mere fact that the guaranty was executed before the note will not make it void. In *Howland v. Aitch*, 38 Cal. 133, 136, the court stated that:

"It is a matter of no moment at what time, relative to each other, the contracts may have

been made and delivered, and the consideration may have passed, if they together constituted one transaction."

The language was applied in *Drovers' National Bank v. Browne*, 88 Cal. App. 716, 264 Pac. 265, 268, where the defendant had executed a guaranty before the issuance of the note secured, under circumstances very similar to those now under consideration, and the court said that: "Defendant cannot complain that the guaranty was executed 5 days before the renewal of the note maturing November 14, 1921."

The guaranty refers to a note "of even date." The words quoted were not intended to limit the defendant's liability to a note of even date, but merely to describe a note which was to be executed as a part of the transaction. The descriptive words chosen were clearly identified by the defendant's own testimony. *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856, 858. Therefore, the primary obligation upon which the guaranty could stand did exist, and the defendant was bound upon his guaranty at the time the note was executed.

It remains to be decided whether the defendant was exonerated because of the modification in the terms of the security held by the bank. A surety or guarantor is exonerated where the original obligation is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto are in any way impaired or suspended, unless the surety knows of the change and consents thereto. *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531,

534. The defendant had knowledge of the Ziebarth deal, so the sole issue remaining is whether he, as guarantor, consented to the Bank's waiver.

Consent may be express or implied from the conduct of the surety, but the burden of proof is on the plaintiff to show consent [43] was granted, *Tuohy v. Woods*, 122 Cal. 665, 667, 55 Pac. 683, 684; and the mere fact that the surety remained silent after he had knowledge of the alteration is insufficient in itself to preclude him from claiming the release. *Pacific National Agricultural Credit Corp. v. Hagerman*, 39 N.M. 549, 51 P. 2d 857, 101 A.L.R. 1301. But when his silence is coupled with affirmative action which would lead the obligee reasonably to believe consent had been given, he is under a duty to obligee to disavow his liability promptly. *Christie v. Commercial Casualty Ins. Co.*, 6 Cal. App. 2d 710, 45 P. 2d 263, 267.

In *Hallock v. Yankey*, 102 Wis. 41, 78 N.W. 156, the defendant, as treasurer of the company whose note he had guaranteed, negotiated several extensions of the note. He was held liable on the guaranty despite the lack of express consent to the change in terms of the original obligation because of his affirmative action. The court said:

“Of course, the obligations of a surety are strictissimi juris. He may have knowledge that an extension has been granted to his principal, and the law does not impose on him the duty to speak. 2 Brandt, Sur. Sec. 345. But the surety is bound by the rules of good faith and fair dealing, as well as other men. If he, as agent

for the principal debtor, requests and obtains an extension of time, and pays the consideration for such extension, and nothing is said as to his liability as surety, it is very obvious that the creditor would naturally and almost inevitably conclude that he consents to the extension individually, as well as in his capacity as agent." Cf. *Mundy v. Stevens*, 3 Cir., 61 Fed. 77, 85.

Except that the defendant here was president of the corporation, instead of the treasurer, the cases are almost identical, and the decisions should be the same. The defendant's conduct was such that no reasonable man could but believe that he had consented to the modification in his personal capacity.

It is difficult to conceive a president of a corporation, owning a controlling interest therein, consenting to a present waiver of the right to foreclose by the holder of the note and in [44] the same breath claiming as an individual he did not consent. Whatever was to the interest of the corporation was certainly to the interest of the defendant. By consenting to the terms of the joint-adventure under his letter of January 10, 1943, he was either unfaithful to the corporation of which he was president or was doing that which he felt furthered the interest of the corporation. His interests and the corporation's were identical. I feel that the entire picture reflects an implied consent on the part of the defendant.

I further feel, that notwithstanding defendant's

claim to the contrary, he was at all times a free agent and that he was not a rubber stamp, as he now claims. He is and was a business man of wide experience, and like many other business men, he sought to enter into defense work. His venture evidently was a failure. He took the risk and lost, and now seeks to avoid his just obligations by claiming ignorance of the consequence of his own act.

The defendant's contention that consent may be implied only where there is an element of estoppel is not borne out by the cases. Consent is none the less real because it is implied, and no element of estoppel is necessary when consent is given. There was nothing to indicate to the Bank that the alteration in security was not made with his consent, and the defendant's own action in participating in the negotiations preliminary to the alteration by signing the letter of January 10th, without objection or reference to his status as guarantor, strongly indicated that it was given. It is only equitable that he be bound by the terms of the original contract. *Union Oil Co. v. Mercantile Refining Co.*, 8 Cal. App. 768, 97 Pac. 919.

The plaintiff is entitled to judgment and counsel for the plaintiff is directed to submit forthwith proposed findings and judgment in accordance with this memorandum opinion.

Dated: This 8th day of May, 1947.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed May 12, 1947. [45]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 2, 1947, the above cause came on for trial and, a jury having been waived, the matter was heard by the Court. Then came James M. Carter, United States Attorney; Ronald Walker and Charles H. Veale, Assistant United States Attorneys, by Charles H. Veale on behalf of the plaintiff, and came the defendant in person and by his Attorney, Jesse W. Curtis, Jr. Evidence both oral and documentary having been heard and introduced, cause was submitted. Thereafter, upon stipulation of counsel, an order was made and entered reopening said cause for further hearing. Whereupon, on April 4, 1947, came the parties by their respective counsel and evidence and argument of counsel having been heard and considered, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

The defendant is a resident of the Southern District of California and within the jurisdiction of this Court. [46]

II.

On November 18, 1942, the American National Bank of San Bernardino, California, loaned to Morrow Aircraft Corporation the sum of \$225,000, evidenced by promissory note of the Morrow Air-

craft Corporation dated November 18, 1942, in the principal sum of \$225,000.

III.

On November 13, 1942, the defendant herein made, executed and delivered to the American National Bank of San Bernardino his guaranty in writing in the sum of \$100,000 for the purpose of guaranteeing in said sum of \$100,000 the payment of said note of \$225,000.

IV.

On November 29, 1944, the American National Bank of San Bernardino made, executed and delivered to the United States of America an assignment wherein and whereby, among other things, plaintiff became the holder and owner of said guaranty.

V.

At the time of filing of this action, and at all times since, there remained due, owing and unpaid upon said \$225,000 note a sum of money in excess of \$100,000.

VI.

The \$225,000 loan to the corporation was secured by a chattel mortgage on all furniture, fixtures, machinery and equipment, tools, tooling, and accessories owned or to be acquired by the corporation for use in connection with the operation of the manufacturing plant belonging to it.

VII.

In November of 1942, the Government placed one Guy L. Goodwin in the corporation's plant as mana-

ger. Thereafter, in the early part of January, 1943, the corporation began negotiations with one Fritz Ziebarth to enter into a joint adventure for carrying out Morrow Aircraft Corporation's contracts. Ziebarth would not close the transaction until the American National Bank of San Bernardino, among other things, had agreed not to foreclose on its chattel mortgage during the existence of the joint adventure, except with his [47] consent. On January 10, 1943, the defendant in his capacity as president of the corporation signed a letter addressed to the American National Bank of San Bernardino, in which letter the conditions imposed by Ziebarth were stated. On January 19, 1943, the American National Bank of San Bernardino executed a document entitled "Consent, Waiver and Agreement of Indemnity" and the joint adventure was entered into on the same day. The joint adventure was terminated in January, 1946.

VIII.

The defendant owned the majority of stock in the corporation and actively engaged in the conduct of its business up to Dec. 2, 1942. After the said Guy L. Goodwin became manager of the plant, the defendant continued to participate in the corporation's affairs.

IX.

The defendant had knowledge in the month of November, 1942, of negotiations which were then being carried on by and on behalf of the corporation for the purpose of borrowing the sum of \$225,000.00

from the American National Bank of San Bernardino. He knew that out of said sum of money there was to be paid a then existing obligation of \$100,000 and that he was then obligated as a guarantor of said \$100,000. He also knew that one of the requisites of the new loan was the execution of the guaranty up to \$100,000 hereinabove mentioned. The guaranty was dated November 15, 1942, and the note for \$225,000 was dated November 18, 1942, the loan being consummated some time after November 18, 1942, and each had reference to and constituted one transaction.

X.

Nine days prior to the execution by the bank of the "Consent, Waiver and Agreement of Indemnity," the defendant had knowledge of the proposed joint adventure and of its terms and requirements, and on January 10, 1943, in his capacity as president of the corporation, he signed a letter directed to the bank, wherein said requirements and terms were stated.

XI.

On May 4, 1945, plaintiff demanded of defendant the payment of the sum of \$100,000, in accordance with the terms of the guaranty. Plaintiff [48] has failed and refused to pay the same or any part thereof, and there is now due and owing from defendant to plaintiff the sum of \$100,000, with interest at the rate of 6% per annum from and after said date.

CONCLUSIONS OF LAW

I.

The defendant consented to the execution by the American National Bank of San Bernardino on the 19th day of January, 1943, of the document entitled "Consent, Waiver and Agreement of Indemnity" and is not entitled to judgment under his Separate and Second Defense.

II.

Notwithstanding the fact that the guaranty executed by the defendant bore date November 13, 1942, and the primary obligation described in the guaranty as a note of "even date herewith," but bearing date November 18, 1942, the execution and delivery of the respective documents were a part of one and the same transaction and constitute consideration for the execution of the guaranty, upon which the plaintiff is entitled to recover.

III.

Plaintiff is entitled to judgment against the defendant, Howard B. Morrow, in the sum of \$100,000, together with interest at the rate of 6% per annum thereon from May 4, 1945, and for costs and disbursements in this action.

Let judgment be entered accordingly.

Dated this 3rd day of June, 1947.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed June 3, 1947. [49]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 4428-BH Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD B. MORROW,

Defendant.

JUDGMENT

On January 2, 1947, the above cause came on for trial and, a jury having been waived, the matter was heard by the Court. Then came James M. Carter, United States Attorney, Ronald Walker and Charles H. Veale, Assistant United States Attorneys, by Charles H. Veale on behalf of the plaintiff, and came the defendant in person and by his Attorney, Jesse W. Curtis, Jr. Evidence both oral and documentary having been heard and introduced, cause was submitted. Thereafter, upon stipulation of counsel, an order was made and entered re-opening said cause for further hearing. Whereupon, on April 4, 1947, came the parties by their respective counsel and evidence and argument of counsel having been heard and considered, and the Court having made its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that plaintiff, United States of America, recover of and from defendant, Howard B. Morrow, the sum of

\$100,000, together with interest at the rate of 6% per annum from and after May 4, 1945, and plaintiff's costs taxed herein amounting to \$29.23.

Dated this 3 day of June, 1947.

BEN HARRISON,
United States District Judge.

[Endorsed]: Judgment entered, docketed June 3, 1947, Book 43, Page 452. [50]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America, Plaintiff Herein,
and James M. Carter, United States Attorney,
Ronald Walker, Assistant United States Attorney,
and Charles H. Veale, Assistant United States Attorney, Its Attorneys:

Notice is hereby given that Howard B. Morrow, the defendant above named, hereby appeals to the Circuit Court of Appeals for the 9th District from a final judgment entered in the above entitled matter on June 3, 1947.

Dated: August 27, 1947.

CURTIS & CURTIS,
By: JESSE W. CURTIS, JR.,
Attorneys for Defendant.

[Endorsed]: Filed and mailed copy to Charles H. Veale, attorney for plaintiff, Aug. 29, 1947. [51]

[Title of District Court and Cause.]

AFFIDAVIT OF
JESSE W. CURTIS, JR.

Jesse W. Curtis, Jr., being first duly sworn, deposes and says:

That he is now and has at all times since the commencement of the above entitled action, been an attorney at law duly licensed to practice before the above-entitled court, and has at all times, and does now represent the defendant, Howard B. Morrow.

That affiant, on behalf on his client, has heretofore submitted an offer of compromise of the judgment heretofore rendered herein, which offer of compromise is now in the hands of the Attorney General's office in Washington, D. C., for consideration; that the Assistant United States Attorney there to which this case has been assigned is one A. B. Holman who is away on vacation and will not return for several weeks; that it is to the best interest of all parties hereto that any further proceedings herein be delayed until some determination has been made with respect to [52] the offer of compromise.

JESSE W. CURTIS, JR.

Subscribed and sworn to before me this 27th day of August, 1947.

[Seal] /s/ RUTH SHILLING,

Notary Public in and for said
County and State.

[Endorsed]: Filed Aug. 29, 1947. [53]

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME
TO FILE RECORD AND DOCKET
CAUSE

Comes now Howard B. Morrow, the defendant in the above entitled action, having filed his Notice of Appeal and cost bond in the manner and within the time required by law, and moves the above entitled court for an extension of time, to wit, 90 days from August 28, 1947, to date upon which Notice of Appeal was filed, to file record and docket cause; that the foregoing motion is based upon the affidavit of Jesse W. Curtis, Jr., attorney for said Howard B. Morrow, and upon the records, papers and files in this case on file herein.

Dated: August 28, 1947.

CURTIS & CURTIS,
By: JESSE W. CURTIS, JR.,
Attorneys for Defendant,
Howard B. Morrow.

So stipulated.

/s/ CHARLES H. VEALE,
Of Counsel for Plaintiff.

It is so ordered.

Date: Aug. 28, 1947.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed Aug. 29, 1947. [54]

[Title of District Court and Cause.]

AFFIDAVIT FOR
ENLARGEMENT OF TIME

State of California,
County of San Bernardino—ss.

Jesse W. Curtis, Jr., being first duly sworn,
deposes and says:

That he is now and has at all times since the commencement of the above entitled action, been an attorney at law, duly licensed to practice before the District Court of the United States, in and for the Southern District of California, Central Division, and has at all times here mentioned, and does now, represent the defendant, Howard B. Morrow, in the above entitled cause;

That affiant, on behalf of his client, has heretofore submitted an offer of compromise of the judgment heretofore rendered herein, which offer of compromise is now in the hands of the Attorney General's office, in Washington, for consideration; that the cause of action to which the complaint herein relates [55] pertains to an alleged guarantee of the defendant upon a Regulation V loan made to a war contractor; that affiant is informed, and believes, and therefore alleges, that the War Department is making an extensive investigation for the purpose of advising the Attorney General's office as to whether or not the offer of compromise heretofore referred to should be accepted; that affiant further alleges, on information and belief, that the investi-

gation has not yet been completed, and no action has as yet been taken by the Attorney General's office upon defendant's offer of compromise;

That Notice of Appeal was filed herein on August 27, 1947; that thereafter the above entitled court extended the time to file record and docket cause for a period of 90 days from August 28, 1947; that said extension expires November 27, 1947; that it is to the best interest of the parties hereto that the time to file record and docket cause be further enlarged for a period of 90 days from and after November 25, 1947.

/s/ JESSE W. CURTIS, JR.

Subscribed and sworn to before me this 25th day of November, 1947.

[Seal] /s/ MARK WATTERSON,

Notary Public in and for said
County and State.

[Endorsed]: Filed Nov. 28, 1947. [56]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

The above named defendant, and appellant, Howard B. Morrow, pursuant to Rule 75 (d) files concurrently with Designation of Contents of Record on Appeal this, his Concise Statement of Points on which he intends to rely on appeal as follows:

1. The District Court erred in overruling the motion interposed by the defendant and appellant to dismiss the original complaint filed in the cause for failure to state a claim.
2. The District Court erred in failing to make a finding on a material fact, viz., whether the defendant and appellant consented to a modification in the security.
3. The Conclusion of Law that the defendant and appellant consented to the execution by the American National Bank of San Bernardino on the 19th day of January, 1943, of the document entitled "Consent, Waiver and Agreement of Indemnity" is contrary to the evidence and the law.
4. The Findings of Fact and Conclusions of Law are [59] insufficient to support the judgment.
5. The evidence is insufficient to support the judgment.
6. The judgment is against the law.

CURTIS & CURTIS,

By /s/ JESSE W. CURTIS, JR.,

Attorneys for Defendant
and Appellant.

Received copy of the within Statement of Points
this 15th day of April, 1948.

JAMES M. CARTER,

U. S. Atty.,

By GERTRUDE M. JOHNSON,

Attorney for Plaintiff.

[Endorsed]: Filed April 15, 1948. [60]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The above named defendant, Howard B. Morrow, having heretofore filed his Notice of Appeal to the Circuit Court of Appeals for the Ninth District from a final judgment entered in the above entitled matter on June 3, 1947, and the time for the filing of record and docket cause having been extended to May 20, 1948, hereby makes the following Designation of Contents of Record on Appeal pursuant to Rule 75 (a) :

1. Plaintiff's Complaint on Guaranty with Exhibit "I" attached thereto.
2. Defendant's Motion to Dismiss for Failure to State a Claim with Affidavit of Jesse W. Curtis, Jr., attached thereto as Exhibit "A" and Consent, Waiver and Agreement of Indemnity attached to said affidavit as Exhibit "A."
3. Order denying defendant's Motion to Dismiss.
4. Defendant's Answer to Complaint with Exhibits "A" and "B" attached thereto. [61]
5. Reporter's Transcript of Proceedings, dated January 2, 1947.
6. Plaintiff's Exhibit One.
7. Notice by Clerk of District Court, dated March 4, 1947, that cause is set for further trial.

8. Reporter's Transcript of further proceedings, dated April 4, 1947.
9. Defendant's Exhibit "A."
10. Memorandum Opinion.
11. Findings of Fact and Conclusions of Law.
12. Judgment.
13. Notice of Appeal, dated August 27, 1947.

CURTIS & CURTIS,

By /s/ JESSE W. CURTIS, JR.,
Attorneys for Defendant
and Appellant.

Received copy of the within Designation of Contents this 15th day of April, 1948.

JAMES M. CARTER,

United States Attorney.

By /s/ GERTRUDE M. JOHNSON,
Attorney for Pltf.

[Endorsed]: Filed April 15, 1948. [62]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 62, inclusive, contain full, true and correct copies of Complaint on Guaranty; Motion to Dismiss for Failure to State a Claim; Affidavit of Jesse W. Curtis, Jr.; Minute Order Entered February 4, 1946; Answer; Stipula-

tion; Copy of Notice of Setting for Further Trial; Plaintiff's Exhibit 1; Defendant's Exhibit A; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Affidavits, Motions and Orders Extending Time to File Record and Docket Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal and Designation of Contents of Record on Appeal which, together with copy of reporter's transcript of proceedings on January 2, 1947, and April 4, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$15.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 5th day of May, A.D., 1948.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

In the District Court of the United States for the
Southern District of California, Central Division

NO. 4428-BH-Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD B. MORROW,

Defendant.

Honorable Ben Harrison, Judge presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff: Charles Veale, Esquire, Asst.
U. S. Attorney.

For the Defendant: Jesse W. Curtis, Equire.

Los Angeles, California,

Thursday, January 2, 1947, 10:00 A.M.

(Case called by the clerk.)

Mr. Veale: The plaintiff is ready, your Honor.

Mr. Curtis: The defendant is ready.

The Court: Gentlemen, in looking over the file I wonder if the wrong guarantee has not been attached to the copy I have. It differs a little bit from the original.

Mr. Veale: I was not aware of that, your Honor.

The Court: The original is all right. The guarantee that is attached to the copy for my file is signed "Frank A. Morrow". The complaint itself, however, has the one signed by the defendant.

Mr. Curtis: This is a joint and several guarantee—that is, each guarantor signed a separate instrument. This is a suit merely on the guarantee of Howard Morrow.

The Court: What facts are stipulated to, gentlemen?

Mr. Veale: I was about to state, your Honor, it is stipulated that the defendant Howard B. Morrow, executed the guarantee sued upon and that at the time of its execution or at the time of the filing of this action and at this time, there is a balance due upon the primary obligation in excess of \$100,000. The guarantee here is limited to \$100,000.

I think it can also be stipulated to that the joint adventure between the Morrow Aircraft Corporation and Ziebarth, [3*] which is mentioned in defendant's answer, was executed in the form pleaded and upon the date shown by the pleadings.

The Court: There is no question as to the note and guarantee being duly assigned to the United States.

Mr. Curtis: No question about that.

The Court: And, as I understand, you admit all the allegations of the complaint except as it is varied by your two special defenses.

Mr. Curtis: Well, with this exception, your Honor——

The Court: In other words, you claim there was an alteration in the collateral or security?

Mr. Curtis: Yes.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: That relieves the guarantor. And I believe you also raise a question as to the time of execution of the two instruments?

Mr. Curtis: Yes, we do. We have two separate defenses pleaded. One of them relates to the existence of the joint-adventure agreement. In other words, the bank had agreed that there would be no action upon, no attempt to foreclose during the existence of the joint-adventure agreement. At the time this action was brought the joint adventure agreement was still in effect and we have pleaded an answer based upon that fact.

Since that time the joint adventure has been dissolved and is no longer in effect. So, I take it, that [4] answer has no particular bearing. However, the other answer which—the other special defense and upon which we are relying was the fact that there was an alteration in the underlying agreement without the consent of the guarantor and for that reason he is exonerated.

Now, there is one other point, another matter that we wish to raise. We raised it in our motion to dismiss and we would like to raise it again, and that is the fact that the guarantee as pleaded and as the evidence will show, refers to a note of even date. The guarantee was dated the 13th of November. There is no note in existence of even date of the guarantee.

Our thought was there that inasmuch as the liability of a guarantor must be strictly construed that there is no fundamental underlying obligation to which the guarantee refers.

The note which the plaintiff here will produce is a note dated the 18th day of November, which, obviously, is not of even date and therefore the proof will be at variance with the terms of the guarantee.

The Court: You say the note is dated the 18th?

Mr. Curtis: 18th of November.

The Court: Woudn't it then be a question of fact as to identity?

Mr. Curtis: No. Our defenses are largely technical [5] based upon the contention that there should have been an action, an equitable action to perform the instrument or guarantee. We are not going to raise the contention that there was not the lack of identity or that there was an actual——

The Court: Of course, it will not be a question of fact as to whether or not these instruments were executed simultaneously.

Mr. Curtis: It might be, although I believe the facts will show that they were not executed simultaneously.

The Court: I mean as one transaction.

Mr. Curtis: They were executed as one transaction.

The Court: No question about that.

Mr. Curtis: No.

Mr. Veale: That would be our contention as to that point, that they were executed as one transaction and we believe the facts will show that.

Mr. Curtis: I believe that is true, your Honor. My objection in that respect is only as a technical one based upon the contention that the note, if it

does not conform to the guarantee should be reformed. This is an action of law and the plaintiff must rely upon the guarantee and its terms. The guarantee refers to a note which is not—does not conform to the note which will be presented here.

The Court: Can it be stipulated by the parties that the note and the guarantee were executed as a part of one [6] transaction.

Mr. Curtis: Yes, your Honor, I will stipulate to that.

Mr. Veale: So stipulated.

The Court: Is there any question that the two documents were executed on two different days? In other words, sometimes they are executed on the same day but bear different dates.

Mr. Curtis: I don't know whether there will be any possibility of establishing with any degree of certainty that fact, but they were executed, I believe, in different places and I believe the evidence will show that, and I think the evidence might even establish that they were signed on different days, but——

Mr. Veale: I think that is quite right, your Honor. The documents were executed as a culmination of considerable negotiation that had taken place prior, long prior to the execution of this note or the guarantee contract, and represent an increase in liability of the Morrow Aircraft Company from approximately \$100,000 to \$225,000. But, as Mr. Curtis has said, those negotiations were carried on at several different places—down at the bank in San Bernardino, the Federal Reserve Bank in Los

Angeles, and probably some at the Morrow Aircraft place of business.

Mr. Curtis: And the principals who were involved were widely scattered over the country.

Mr. Veale: I think that is true. [7]

Mr. Curtis: These papers were signed wherever they could be found. I do not know that we are in position to establish whether Howard Morrow signed that note in San Bernardino or New York City. I don't know that that particular fact is important.

The Court: Have you any evidence as to where these two different documents were executed?

Mr. Veale: I just asked Mr. McCauslin of the Federal Reserve Bank, and he tells me that he does not know.

The Court: Have you any evidence to offer as to the identity of the note as tied into the guarantee?

Mr. Veale: Yes, yes. We would offer testimony by Mr. McCauslin who was thoroughly familiar with all the negotiations leading up to the transaction as well as the transaction itself.

The Court: Then let us proceed with whatever evidence you have.

Mr. Curtis: At this time do you want to complete our stipulation with respect to the matters set forth in the defense? In other words, we have pleaded certain documents, one, the execution of the joint-adventure agreement.

The Court: I think he stated that there was.

Mr. Curtis: He stated that but he did not state the chattel mortgage.

Mr. Veale: I just neglected to do it. I meant to do it. [8]

The Court: Now, just a moment. The execution of the chattel mortgage is designated as Exhibit A and the consent waiver and agreement of indemnity is marked Exhibit B.

Mr. Curtis: Yes.

The Court: Pleased in the answer, and are deemed admitted?

Mr. Curtis: Deemed admitted, yes.

There is one other thing, too, your Honor. In the answer we have denied knowledge and consent on the part of this defendant to the modification that was pleaded at a time when the evidence with respect to that matter was somewhat uncertain. In preparing the case we have come to the conclusion that the knoweldge which the defendant received was in all probability and was in fact prior to the modification agreement.

The Court: In other words, you at this time are ready to stipulate that they had knowledge of and consented to the modification?

Mr. Curtis: No. We are willing to stipulate that he had knowledge of, but we are relying now upon the fact that he did not consent to it, never requested to consent to it and did not by any act consent to it.

The Court: That is the sole issue of fact.

Mr. Curtis: That is the sole issue of fact.

Mr. Veale: May it also be stipulated that this letter, [9] a photostat, is a copy of a letter signed

by Mr. Morrow with the exception of the handwriting on the lower part of the front page?

Mr. Curtis: Yes, I will stipulate to the letter.

Mr. Veale: In that case we offer this letter. That should probably be Government's Exhibit 2. I want to offer a copy of the guarantee as Government's Exhibit 1.

The Court: It is pleaded and admitted. Why encumber the record with it? Government's Exhibit 1 will be admitted.

(The document referred to was marked as Government's Exhibit 1, and was received in evidence.)

Mr. Veale: Mr. McCauslin, will you take the stand?

H. E. McCAUSLIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: H. E. McCauslin.

Direct Examination

By Mr. Veale:

Q. What is your business, Mr. McCauslin?

A. Head of the Credit Department of the Los Angeles Branch of the Federal Reserve Bank.

Q. How long have you been so engaged?

A. About 14 years. [10]

Q. Are you familiar with the various negotia-

(Testimony of H. E. McCauslin.)

tions and transactions involving the loaning of money to the Morrow Aircraft Company?

A. To a considerable extent, yes.

Q. Can you state the nature and amount of the original obligation of the Morrow Aircraft Company?

A. Before answering that, when you say "original obligation," do you mean the first loan that they made under this Regulation "B"?

Q. Yes. A. That was \$100,000.

Q. And do you recall when that was made?

A. Well, the application for that \$100,000 loan was made in July 1942.

Q. Do you recall who signed the application or who made the application?

A. Well, the application, naturally, would be made by what we call the financing institution, which in this case was the American National Bank of San Bernardino.

Q. You know Mr. Morrow, do you?

A. Yes.

Q. Do you know his brother as well, Frank Morrow? A. I have met him.

Q. Now, in the fall of 1942 did you carry on any negotiations with Mr. Morrow or with anyone of the Morrow [11] Aircraft Company?

A. Only indirectly. That would be the financing institution, the American National Bank of San Bernardino.

Q. I did not quite finish my question.

A. Pardon me.

(Testimony of H. E. McCauslin.)

Q. Did you carry on any such negotiations with the view of increasing that loan from \$100,000 to \$225,000? A. Yes.

Q. Now, in connection with those negotiations did you have occasion to meet and talk with Mr. Howard Morrow concerning it? A. Yes.

Q. Where?

A. In the office of the Federal Reserve Bank in Los Angeles.

Q. Did you also have occasion to go to the American National Bank in San Bernardino in connection with those negotiations?

A. I don't recall that I did in connection with those particular negotiations.

Q. Do you recall the execution of the guarantee upon suit is here filed?

A. Well, only to the extent that that came to us through the American National Bank of San Bernardino.

Q. Were you familiar with or did you have any—did [12] you give any instructions to the American National Bank or to the Morrow Aircraft Company with respect to those documents that were then being executed?

A. Well, I don't recall distinctly that we did.

Q. To refresh your memory, Mr. McCauslin, I show you Government's Exhibit 1, which is a letter dated January 10, 1943, and ask you if you made any suggestions or changes in the plans set forth in that letter? A. (No answer.)

(Testimony of H. E. McCauslin.)

Q. Did you offer any modification of that letter?

A. Well, I believe that we offered somewhat of a modification of this paragraph No. 5.

Q. Of course that letter had to do with the proposed joint adventure which was being entered into between the Morrow Aircraft Company and Ziebarth, did it not? A. Yes.

Q. Prior to that time had you talked with Mr. Howard Morrow concerning the necessity of having additional capital for them to operate on, or do you recall that?

A. I don't recall that particularly. Mr. Morrow, Howard Morrow, was in the back talking to the liaison officer, who made the contacts with the borrowers, and there was more or less general discussion about the need for additional funds to operate the business.

The Court: What do you know about Mr. Morrow's consenting [13] to the releasing of the properties covered by the chattel mortgage insofar as any conversations you had with Mr. Morrow or any correspondence you had with him?

A. Nothing so far as conversations. The only correspondence is the copy of a letter that was just introduced here in evidence. Beyond that I know nothing.

Q. (By Mr. Veale): Do you have any knowledge—did you have any knowledge, Mr. McCauslin, of when and where the \$225,000 note and the guarantee contract were in fact executed—when and where?

(Testimony of H. E. McCauslin.)

A. No, I do not, because those were executed, presumably, at the American National Bank in San Bernardino.

The Court: And you never saw them until there was a default, is that it?

The Witness: We were supplied with copies immediately.

Q. (By Mr. Veale): Well, it is true, is it not, Mr. McCauslin, that the Federal Reserve Bank required of the American National Bank——

The Court: What they required of the American National Bank would not be binding upon this defendant. There is only one issue here. Did he consent to the release of this security?

Mr. Veale: That is true, but my question was preliminary. I will put the question this way:

Q. The proposed \$250,000 loan, although being made by [14] the American National Bank to the Morrow Aircraft Company, was nevertheless under the supervision of the Federal Reserve Bank, was it not? A. Yes, sir.

Q. And the Federal Reserve Bank was familiar with all of the negotiations leading up to its execution? A. I believe so.

Q. Had Mr. Howard Morrow been a guarantor on the \$100,000 obligation prior to that time?

A. Yes, he was.

Q. Do you know whether or not the Federal Reserve Bank had insisted that he be a guarantor on the \$225,000 obligation up to \$100,000?

A. It did insist, yes, sir.

(Testimony of H. E. McCauslin.)

Mr. Veale: That is what I was trying to bring out, your Honor.

The Court: Insisted to the American National Bank?

The Witness: Yes; that was a condition of the loan.

Q. (By Mr. Veale): Do you recall having any conversation with Mr. Howard Morrow subsequent to the execution of the guarantee and up to the date when the joint enterprise was entered into?

A. Oh, I think there were several conversations but I don't recall what they were about.

The Court: Do you remember at any time of Mr. Howard [15] Morrow discussing with you this joint adventure and the necessity of obtaining a release of the chattel mortgage?

The Witness: Well, only to the extent that that came through us, your Honor, from the American National Bank—that letter that he wrote, and we consented, we authorized the bank to enter into the agreement with the joint adventure in response to his request.

Mr. Curtis: I submit, your Honor, the testimony of the witness is a conclusion, largely a legal conclusion.

The Court: It is just a question, gentlemen, whether the court should issue a subpoena for the proper officials of the American National Bank and brought in here because you have this situation. The American National Bank did not carry out the instructions—if they did not, then they should

(Testimony of H. E. McCauslin.)

be made a party to this action. If Mr. Morrow was not liable the American National Bank is liable for failure to carry out their instructions. I am trying to get the facts without the necessity of continuing this and causing you to make another trip and inconveniencing the officials of the bank. Apparently this man does not know anything about the transaction. All he knows is what he learned by hearsay.

Q. (By Mr. Veale): Did Mr. Watkins of the Federal Reserve Bank conduct any part of these negotiations, Mr. McCauslin?

A. Very few, if any.

Mr. Veale: I think that is all I have to ask of Mr. [16] McCauslin.

Cross-Examination

By Mr. Curtis:

Q. Mr. McCauslin, this was a loan made under the provisions of an Act of Congress which they referred to as Title D Loan, was it not?

A. Regulation B loan.

Q. And a loan of that kind was a loan negotiated in the original—in the first instance through a local bank by a, presumably, war contractor, wasn't it? That is the type of loan it was?

A. Correct.

Q. And then the war department was called upon to guarantee that loan to the extent of a certain per cent, in most instances 90 per cent, upon their certification that the corporation was

(Testimony of H. E. McCauslin.)

engaged in an essential war industry, isn't that right? A. Correct.

Q. War work? A. Yes.

Q. And your participation then was that of the agent of the War Department, their fiscal agent in arranging for the loan and caring for it and servicing it throughout its entire time, isn't that true?

A. Yes, sir. [17]

Q. Now, after this loan was—let us take the first \$100,000 loan which was negotiated. At that time Howard Morrow, this defendant, and the other officers of the corporation were in control of the corporation, were they not?

A. That is right.

Q. That is to the extent that they approached the American National Bank in San Bernardino and had conferences also with you and Mr. Watkins in Los Angeles with respect to that loan?

A. Well, they called on us. I think it was in connection with that original loan.

Q. From that time on isn't it a fact—well, strike that. In your office you had dealings with a liaison officer of whom you have spoken, who represented the War Department and who was to be the representative of that department in your office as the point of contact between the two organizations?

A. That is correct.

Q. And on that occasion it was a Colonel Taylor, was it not?

A. Major Taylor at that time.

Q. Major Taylor at that time. And isn't it a

(Testimony of H. E. McCauslin.)

fact that most of the conversations and most of the negotiations which pertained to the first \$100,000 loan as well as to the \$225,000 loan, were all held with Colonel Taylor?

A. Well, I think most of them were. [18]

Q. And that the knowledge which you and Mr. Watkins would have from your end of it would be largely information which you acquired from Colonel Taylor?

A. Not exactly correct. We sat in on conference in Mayor Taylor's office on one or two occasions.

Q. But Major Taylor was the moving force in these negotiations? A. That is correct.

Q. He was the one who asked the questions and gave the answers? A. That is right.

Q. And the bank in most instances, that is, the Federal Reserve Bank, carried out the wishes of the War Department with respect to whatever their instructions might have been?

A. That is correct.

Q. Of course the local American National Bank in this instance was acting as a separate and distinct banking institution, carrying on their normal banking practices with a potential borrower?

A. That is right, yes.

Q. And your participation was merely one of acting as the agent for a guarantor?

A. That is right.

Q. Now, as these negotiations developed there were numerous papers and instruments prepared, were there not? [19] A. Yes, sir.

(Testimony of H. E. McCauslin.)

Q. And isn't it a fact that practically all of these papers, as negotiations progressed, were prepared either in your office—or strike that. Were prepared probably by the American National Bank and reviewed by you before they were signed?

A. In most cases, yes.

Q. And in some instances the documents were prepared by you in your office, were they not?

A. I don't recall any document prepared in our office.

Q. Well, may I refer to Government's Exhibit 1. I would like to have you refer to Government's Exhibit 1 and tell me if by examining it you can tell me who prepared that letter?

A. I haven't the slightest idea.

Q. You haven't any idea who prepared it?

A. No, sir.

Q. Do you know whether or not it was prepared in your office?

A. Well, I don't think it was prepared in our office.

Q. There are no initials on it? A. No.

Q. I will show you what I think Counsel will stipulate is the original of the photostat, marked Government's Exhibit 1, and ask you if by examining this letter you can tell [20] whether or not it is a letter prepared in your office.

A. I would say that it was not prepared in our office.

Q. Now, this was later modified, you say, by a subsequent letter.

(Testimony of H. E. McCauslin.)

A. Part of Paragraph 5 was stricken out.

Q. After the \$225,000 loan was made—by the way, during that negotiation do you recall whether you took any part in it at all?

A. Possibly so. I do not recall the extent.

Q. Did you have any dealings with a Guy Goodwin?

A. Yes, sir.

Q. On behalf of the corporation?

A. Yes, sir.

Q. In that respect?

A. Yes, I did.

Q. Now, you knew Guy Goodwin, did you not?

A. Yes, I did.

Q. And at that particular time he was acting as the manager of the Morrow Aircraft Corporation, was he not?

A. I don't recall at which time he was acting as manager other than he was acting, I believe, as manager just prior to the inception of the joint adventure, which was in January 1943.

Q. Well, now, he was acting as manager when this loan was executed, when the note was executed, was he not? [21]

A. I could not answer that definitely, yes.

Q. You do not know when he was there?

A. No, sir.

Q. You don't know in negotiating the loan whether you dealt with Guy Goodwin or Howard Morrow or whether he had any participation at all in those negotiations?

A. I do not recall distinctly, no.

Mr. Curtis: No further questions.

Mr. Veale: That is all. I will ask Mr. Morrow to take the stand under the rule.

HOWARD B. MORROW,

called as a witness under the Rule, being first duly sworn, was examined and testified in behalf of the plaintiff, as follows:

The Clerk: State your name.

The Witness: Howard B. Morrow.

Direct Examination

By Mr. Veale:

Q. Mr. Morrow, you were actively engaged with the Morrow Aircraft Company during all of 1942 and part of 1943, were you not? A. No.

Q. What part of it were you not engaged?

A. There was a part of late 1942 and early 1943 when I was not actively engaged. [22]

Q. Well, can you give us the dates?

A. Well, I can give you the approximate dates.

Q. What were the approximate dates?

A. I would say the last, probably the last week, or possibly the last two weeks of 1942—no, it would be more than that. Probably the last three weeks in 1942 and the first—at least the first three weeks in 1943.

Q. You knew Mr. Ziebarth, did you not?

A. Yes, sir.

Q. How long had you known him?

A. At what time?

Q. Well, how long have you known him at this time?

(Testimony of Howard B. Morrow.)

A. I met Mr. Ziebarth as nearly as I can recall, about, some time in December of 1942.

Q. Do you have any knowledge of what his business was at that time? A. Yes.

Q. Did you participate in any negotiations where in Mr. Ziebarth and the Morrow Aircraft Company were to become engaged in a joint adventure?

A. Only casually. I only—well, I won't volunteer any information unless you ask me.

The Court: What did you have to do with the arrangements that were had with the American National Bank for the release of properties under the chattel mortgage? [23]

The Witness: I had nothing to do with it.

The Court: Nothing whatsoever?

The Witness: None.

The Court: Who handled that?

The Witness: So far as I know, Guy Goodwin.

The Court: And who is he?

The Witness: Guy Goodwin is a man who was nominated by the War Department to act as manager of Morrow Aircraft Corporation in the latter part of 1942.

Q. (By Mr. Veale): You had had considerable dealings with the American National Bank prior to that time, had you not?

A. That is correct.

Q. And you were still dealing with them at the

(Testimony of Howard B. Morrow.)

time you signed that letter dated January 10, were you not?

A. I did not write that letter.

The Court: You signed the letter, didn't you?

The Witness: I did.

The Court: You knew the contents of it?

The Witness: Yes.

The Court: And you knew what was proposed to be done, didn't you, in order to obtain additional financing?

The Witness: In a casual way.

The Court: You were interested in the business?

The Witness: May I say this, that Mr. Goodwin took over the business and he ran it and I had little or nothing to say [24] about it. He handled the entire business. He handed papers to me to sign and told me to sign them and I did.

The Court: Did you own any interest in the Morrow Aircraft Company?

The Witness: I did. I owned the majority interest in the corporation.

The Court: And you didn't know what was going on?

The Witness: I did not say I didn't know what was going on. I said I did what I was told to do.

The Court: But you knew what was going on, didn't you?

The Witness: Yes.

The Court: And you knew about this other man coming in there and obtaining an interest, didn't you?

(Testimony of Howard B. Morrow.)

Mr. Curtis: If your Honor please, I do not like to interrupt, but there is a story which I would like to bring out on cross-examination or upon my examination, which will clear all this up. I think there is a misunderstanding in the Court's mind and a misunderstanding in Mr. Veale's mind as to the history back of this. I think I can in a few minutes tell the story or have Mr. Morrow tell the story as to what happened.

Mr. Veale: I think I know. I do not want to encumber this record with that story.

Mr. Curtis: I think it is very vital to know what took place in order to determine—— [25]

The Court: Just a moment, counsel. You will have an opportunity to question the witness.

Mr. Curtis: Thank you, your Honor.

The Court: You will have an opportunity to ask all the questions you want.

You knew the conditions under which Mr. Ziebarth was coming in and putting in some money, didn't you?

The Witness: Yes, I did.

The Court: And you knew it was going to be necessary to obtain an extension on that chattel mortgage, didn't you, in order to have him become interested?

The Witness: I did not know it until this letter was handed to me to sign.

The Court: Well, you knew it then?

The Witness: And I did not request it.

The Court: You knew it?

The Witness: Yes.

(Testimony of Howard B. Morrow.)

The Court: How many guarantees had you executed? Is this the second guarantee or the first one?

The Witness: Second.

The Court: And the second was for \$100,000?

The Witness: Well, they were one and the same guarantee as I understand it. I merely transferred the first guarantee on the first \$100,000 to the second \$100,000.

The Court: I am trying to get the picture. We have been [26] talking about a first loan on \$100,000 and another one at \$225,000.

The Witness: Well, as I understand it, the procedure was to pay off the first loan by borrowing more money so the \$225,000 immediately cancelled the first one.

The Court: And gave you \$125,000 additional working capital?

The Witness: Yes. So a new guarantee had to be drawn up to cover the second loan as I understand it?

The Court: And that is what you understood when you executed the second guarantee.

The Witness: That is correct.

The Court: That is all.

Mr. Veale: No further questions.

Cross-Examination

By Mr. Curtis:

Q. Mr. Morrow, in the fall, let us say in October, 1942, you and the other officers of the Morrow Aircraft Company were in active control?

A. That is correct.

(Testimony of Howard B. Morrow.)

Q. Of the Morrow Aircraft Corporation?

A. Yes, sir.

Q. Now, subsequent to that Mr. Guy Goodwin became the manager. Can you tell us approximately when that was?

A. Approximately October. [27]

Q. Mr. Goodwin then came to Rialto to assume his position prior to the execution of this note and guarantee?

A. That is correct.

Q. With which we are now concerned?

A. That is correct.

Q. You said Mr. Goodwin was nominated by the Federal Reserve Bank or the War Department?

A. War Department.

Q. Can you tell us how Mr. Goodwin's appointment came into being?

A. (No answer.)

Q. How did it happen that they appointed him?

A. As near as I can recall the Federal Bank or—not the Federal Bank, but the War Department—that is the representative of the War Department, Major Taylor, suggested that perhaps we should have someone there to manage the business and to put it on a more efficient basis.

Q. You were having financial difficulties about that time, were you not?

A. That is correct.

Q. And you talked to Major Taylor about some additional financing, is that right?

A. That is right.

Q. And it was mutually agreed, was it not, at

(Testimony of Howard B. Morrow.)

that time, that Mr. Goodwin would become the manager of Morrow [28] Aircraft?

A. It was.

Mr. Veale: If your Honor please, I do not like to object all the time but——

The Court: I told him I was going to let him get his story in.

Mr. Veale: I appreciate that, your Honor, but I have read the story three or four times.

The Court: I haven't so it will be new to me.

Mr. Veale: And it has nothing in the world to do with the issues before your Honor, not a thing. It merely sets out some equities——

The Court: I assume he is going to make it brief.

Mr. Curtis: I am not going to bring out the matters set forth in my letter. I am merely going to bring out some of the background upon which this note, this Government's Exhibit A or 1 was and must be interpreted. Not only that, but also the other things which existed which will nullify the slightest inference that there was any consent from Howard Morrow to this extension. I am not going to——

Mr. Veale: We have no objection to that. If counsel confines it to that we will have no objection.

Mr. Curtis: That is the entire purpose of it.

The Court: Proceed.

Q. (By Mr. Curtis): Now, can you tell us—I presume that you and Colonel Taylor had some discussion with respect [29] to Mr. Goodwin's re-

(Testimony of Howard B. Morrow.)

responsibilities. Can you tell us what his responsibilities were—to whom was he responsible?

A. Mr. Goodwin you mean?

Q. Yes.

A. Well, my impression was that he would be, you might say, jointly responsible to the Army and to Morrow Aircraft. He was hired and paid by Morrow Aircraft but the Army—well, they found him and it was arranged that he should go to work.

The Court: Where is Mr. Goodwin now?

The Witness: I don't know, your Honor.

Mr. Veale: He is a member of the Armed Forces, I think, and is not available.

Mr. Curtis: Mr. Goodwin is here locally somewhere I think. I don't know.

Q. (By Mr. Curtis): Mr. Goodwin was suggested to you by Major Taylor?

A. Yes, sir.

Q. You did not know Mr. Goodwin before?

A. No.

Q. Didn't know him in any other connection?

A. No.

Q. And you did not meet him until after he had been appointed, did you?

A. Yes. [30]

Q. You met him before?

A. Yes.

Q. But he was shortly taken in and put into that position?

A. I met him once.

Q. Now, then, after he went in the loan was approved and the note signed?

(Testimony of Howard B. Morrow.)

A. Mr. Goodwin, as I recall, negotiated the loan.

Q. He negotiated this \$125,000 loan?

A. Yes.

Q. Which was joined with the \$100,000 loan to make it \$225,000? A. That is correct.

Q. And in that negotiation did you participate? Did you participate in negotiating with the American National Bank for this additional \$125,000?

A. Yes, sir.

Q. With Mr. Goodwin? A. Yes, sir.

Q. He was active both in his negotiations with the American National Bank and also with the War Department? A. That is correct.

Q. And the loan was made. Now, subsequent to the making of the loan you and Mr. Goodwin had a disagreement, did you not? [31]

A. (No answer.)

Q. Or what, if any?

A. Well, if I may say so, I would not call it a disagreement.

Q. You tell us what happened.

The Court: I don't care what happened. If he left that is all there is to it.

The Witness: No, he didn't leave.

Mr. Curtis: This is vital, your Honor, as I think you will see.

The Witness: Well, I was—I disagreed with the way Mr. Goodwin was running the business and I went to the Federal Reserve Bank and talked to Major Taylor and complained about it.

(Testimony of Howard B. Morrow.)

Q. (By Mr. Curtis): Now, the complaint that you made had to do with, I take it, with the manner in which he was running the business?

A. That is correct. Mr. Goodwin assumed a very dictatorial attitude only a day or two after he went to work there and his idea was that he was running the whole business. I knew that he didn't have the technical knowledge to run the business and I tried to help him. As a matter of fact, I called all of the entire organization together and asked for their cooperation with Mr. Goodwin, but immediately Mr. Goodwin became pretty dictatorial and he didn't have the [32] technical knowledge as to how to run the business, which I thought he did have, so I went to see Major Taylor and told him about it and I said that—well, as a matter of fact, as time wore on, our production went down very rapidly and our expenses went up, which did not make me happy at all.

Q. (By Mr. Curtis): That was while Mr. Goodwin was there? A. That is correct.

Q. Now, did you tell—you did go to see, I guess he was Major Taylor—excuse me. You did go to see Major Taylor? A. Yes, sir.

Mr. Veale: That is asked and answered.

Mr. Curtis: I want to lay a foundation for the conversation.

Q. (By Mr. Curtis): Was anyone else present?

A. Guy Goodwin.

Q. And this conversation took place where?

(Testimony of Howard B. Morrow.)

A. In Major Taylor's office, Federal Reserve Bank.

Q. As near as you can tell us, when did it take place?

A. Well, it was before the forming of the joint adventure and after the new had been signed.

Q. Was it before any negotiations had been undertaken with respect to the joint adventure?

A. Yes. [33]

Q. And at that time what did you tell Colonel Taylor or Major Taylor?

A. I told Colonel Taylor what I already told the court, that the man was handling the business very inefficiently and I was—well, that the thing was going downhill instead of uphill and Major Taylor turned on me very fiercely and used very profane language. He was vituperative and called me names, which I would not care to repeat here, and told me that I had better get off the dime and cooperate with Goodwin and do what they told me to do or else.

Q. Did he tell you—you say his manner was very forceful?

A. Well, he was extremely profane. He was about as profane as any man could be. He called me names that I have never been called before and, well, he was more than insulting.

Q. And he told you—

A. He told me I had to cooperate with Good-

(Testimony of Howard B. Morrow.)

win and to do what Goodwin told me to do or it would be just too bad for me.

Q. Then what did you do?

A. I said nothing at all. I felt there was no point in answering the man in like fashion or in quarreling with him. I just held my peace and I went back to work and did what Goodwin told me to do. [34]

Q. Then you went back to Rialto and offered to help, as I think you said a while ago, tried to help Goodwin?

A. Yes, sir.

Q. Did you still continue to try to help?

A. Naturally. My entire fortune was involved.

Q. What were your relations with Goodwin from that time on?

A. I cooperated with him. Did what he told me to do.

Q. Now, subsequently there were negotiations undertaken to form this joint adventure that we have talked about with Ziebarth?

A. That is right.

Q. Did you ever sit in on any phase of that negotiation?

A. Practically none.

Q. When you say practically none——

A. As a matter of fact, I was not at any meeting.

Q. Well, when was it that you first found out that there was any such thing in the air?

A. Well, I was told what they were doing.

Q. By whom?

A. By Goodwin.

(Testimony of Howard B. Morrow.)

Q. Were you asked whether or not it was in accordance with your wishes?

A. Honestly I can't recall whether I was asked or not.

Q. Well, you were told in a general way what was being [35] undertaken?

A. Yes. I knew what was going on.

Q. But you did not attend any of the negotiations as a matter of fact?

A. I don't believe so.

Q. And in the final analysis a contract was—a joint adventure agreement was prepared and that agreement, of course, was signed by the corporation but you did not sign it as an officer at that time?

A. I don't believe so.

Q. In fact, that agreement was signed January 19, 1943. You were not even in this part of the country at that time?

A. No, I wasn't.

Q. Well, thereafter with respect to any matters pertaining to the corporation that required the signature of the president or other officers, they were prepared and handed to you for signature. I am not speaking now of the joint adventure but just generally?

A. Yes, that is correct. I was sort of, if I may say so, a rubber stamp. After all, I was still the president of the corporation and as president I had to sign certain things in order to keep other things moving, but it was nominal.

Q. I would like to hand you Government's Exhibit 1 and ask you—let me hand you the original

(Testimony of Howard B. Morrow.)

of Government's Exhibit 1 and that is the letter which bears your signature. [36] Do you know who prepared that? A. No.

Q. Do you know whether or not you prepared it? A. I know I didn't.

Q. Do you remember the circumstances under which it was handed to you?

A. No. I didn't even know I had signed such a letter until it was shown to me.

Q. In fact you didn't know you signed such a letter until it was shown to you personally here?

A. That is right.

Q. Now, as a part of that same transaction the American National Bank agreed to loan Morrow Aircraft another \$50,000, didn't they?

A. Yes, they did.

Q. Did you or to your knowledge any other officer of the Morrow Aircraft Company request the American National Bank for an additional loan?

A. No officer of our corporation made that request to my knowledge.

Mr. Veale: If the court please, that is certainly self-serving.

The Court: What has it to do with this transaction?

Mr. Veale: Nothing.

Mr. Curtis: It has this to do, your Honor. There was [37] an additional \$50,000 loaned the Morrow Aircraft Corporation, not upon the instigation of the Morrow Aircraft Company, but upon

the instigation of the War Department in order that this joint adventure would work out. No attempt was made to ask Mr. Morrow whether he consented to it or did they care and they have never and to this day they recognized that there is no liability.

The Court: That has nothing to do with this case.

Mr. Morrow: I would like to put it in for whatever it is worth.

The Court: It isn't worth enough to put in.

Mr. Veale: We object to it as immaterial and irrelevant.

The Court: Objection sustained.

Mr. Curtis: That is all.

Mr. Veale: No further questions. The Government rests.

Mr. Curtis: The defendant rests.

The Court: Do you gentlemen desire to submit any additional authorities?

Mr. Veale: I don't know, your Honor, whether my memorandum that I submitted is intelligible. I think probably I would like to have an opportunity to redraft it. It was done rather hurriedly.

The Court: This case has been pending a long time and [38] the court has granted a number of continuances in order that it might be adjusted outside and avoid the necessity of a judgment, and if either side desires to submit any additional authorities you may do so.

There is no question in the court's mind, in view of the exhibit, that Mr. Morrow was aware of what

was going on. It doesn't impress the court very seriously to have a man of Mr. Morrow's long experience coming here and saying that he was doing these things but did not know what he was doing.

Mr. Curtis: Could I be heard for a moment on that?

The Court: Well, I shall not object to listening, Mr. Curtis, but——

Mr. Curtis: I would like to make my point and my position clear in that respect.

We have stipulated and admitted from the beginning that Mr. Morrow knew what was going on which, of course, brings us directly under the line of cases of which I find none contrary, to the effect that there is no obligation upon a guarantor to speak up and say that he objects when he has full knowledge of an alteration to be made. He has no obligation whatever. That obligation is upon the creditor to see that he does consent.

Now, Mr. Morrow knew what was going on. We admit that he knew all along—not that he was a principal in the [39] transaction. He was not. He knew about it more or less by way of courtesy and he was informed—it is true he had no thought of a guarantee. Nobody had any thought about whether the guarantee was going to be released or whether he would be exonerated. That was not one of the considerations. The consideration here merely was to put this thing in shape so they could go on for further production.

Mr. Morrow was requested to sign as the president of the corporation this one instrument.

Now, we submit that there is not only nothing in this instrument which can by any stretch of the imagination be considered as a consent. There is evidence here of the fact that Mr. Morrow, even in signing this, was not taking the initiative. He was not taking an active part in any portion of this transaction which the cases say he must show if there is no actual written consent.

Now, those cases—I have not read counsel's memorandum. He just handed it to me when I came in this morning. I would like at least to have an opportunity to read that and file such supplemental authorities as I may think—as may seem advisable. But that particular question of law I think we have exhausted and if there are any cases contrary in counsel's brief I shall be very much surprised because I don't think there are any and with that I will not require much time. [40]

Mr. Veale: I would suggest this, your Honor. I have no additional authorities that I desire to file but I just thought that perhaps I might be able to get my present memorandum in a little better condition or make it a little more intelligible.

The Court: I wouldn't waste paper for that purpose. I think I can follow your reasoning. I have not examined your cases but I have read them.

I will give you gentlemen five days to submit any additional authorities you desire to submit with the understanding that there are only two points to be

covered: That is consent and variation in the note and guarantee.

Mr. Veale: Very well, your Honor.

Mr. Curtis: And if there is anything that requires answering——

The Court: The court will ask for it.

(Whereupon, at 11:00 o'clock the above-entitled matter was concluded.) [41]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 26th day of Feb., A.D., 1946.

/s/ JACK D. AMBROSE,
Official Reporter.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff: Charles Veale, Esquire, Asst.
U. S. Attorney.

For the Defendant: Jesse W. Curtis, Esquire.

Los Angeles, California,
Friday, April 4, 1947, 10:00 a.m.

(Case called by the clerk.)

Mr. Veale: The plaintiff is ready, your Honor.

Mr. Curtis: The defendant is ready.

The Court: Who wants to proceed first?

Mr. Curtis: May I file an additional trial memorandum?

The Court: Yes.

Mr. Veale: I think, if your Honor please, the record of the previous hearing indicates that we have but one issue before the court and that is whether or not Mr. Morrow consented to the alteration agreement.

Mr. Curtis: I think there is a second issue, too, is there not? It is an issue of law which we raised, namely, that the guarantee refers: "To a note of even date herewith", whereas the note itself was dated at a subsequent date.

It has been stipulated that the note was executed as a part of the same transaction but we still reserve our objection.

I don't know that there will be any further testimony with respect to it.

Mr. Veale: That may well be. We have present this morning certain witnesses who were not available before and I would like to have the opportunity of presenting them.

The Court: The only thing is Mr. Curtis asked for the opportunity of taking additional testimony. I don't know who [44] should proceed first.

Mr. Veale: My understanding was the case was reopened.

The Court: It was reopened.

Mr. Curtis: I have no objection to a full hearing on the matter.

The Court: Who wants to proceed first?

Mr. Veale: I believe I should put on my testimony.

The Court: All right.

Mr. Veale: I would like to call Mr. Morrow for further cross-examination.

The Court: Very well.

HOWARD B. MORROW,

called as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Veale:

Q. Mr. Morrow, on or at the time you signed the written guarantee, which you admitted you signed, did you make any objection to it?

(Testimony of Howard B. Morrow.)

Mr. Curtis: Objected to as incompetent, irrelevant and immaterial. The guarantee speaks for itself.

Mr. Veale: I think it will be very material, your Honor.

The Court: Objection overruled. [45]

The Witness: You asked me if I made any objection?

Mr. Veale: Yes.

A. To the guarantee at the time I signed it?

Q. Yes; the execution of the guarantee at the time you signed it?

A. I can't recall that I did.

Q. Will you say you did not or will you say that you did make such an objection?

The Court: He said he doesn't recall, counsel.

Mr. Veale: Very well.

Q. After the contract was executed and up to the time this suit was filed had you made any objection to it? A. Any objection?

Mr. Curtis: Just a minute. I am going to object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

The Witness: Will you re-state your question, please?

Q. (By Mr. Veale): After you had signed the contract and up to the time that this suit was filed had you objected to the alteration?

A. Not to my knoweldge.

(Testimony of Howard B. Morrow.)

Q. In your previous testimony the following question was asked you and the following answer was given:

“Did you participate——”

Mr. Curtis: Where is that? [46]

Mr. Veale: Page 23, line 18. “Did you participate in any negotiations wherein Mr. Ziebarth and the Morrow Aircraft Company were to become engaged in a joint adventure?”

And your answer,

“Only casually. I only—Well, I won’t volunteer any information unless you ask me.”

Do you recall so testifying?

A. Yes, I do.

Q. What did you mean by that?

A. Well, if I may explain in an informal manner. This is the first time I have ever been in court and I was only trying to conduct myself in such a fashion as might have been expected of me. In other words, I was trying to conform to the usual procedure in answering and being asked questions in court.

Mr. Curtis: Counsel, I think the witness is confused by the part of the answer you are referring to.

Mr. Veale: I am referring particularly to the use of the words, “only casually”. What did you mean by that?

A. Well, I meant this. That the joint adventure agreement was not initiated—that is, the discus-

(Testimony of Howard B. Morrow.)

sions were not initiated by myself or by the Morrow Aircraft Corporation. They were initiated by, as I recall, by Colonel Jay Taylor of the Federal Reserve Bank and Mr. Fred Ziebarth. So any discussion that I may have had with them did not originate [47] with me and it was not my idea as president of the corporation.

Q. (By Mr. Veale): You knew about the arrangements that were proposed with reference to the increased loan, did you not?

A. Yes, I did.

Q. And did you meet Mr. Ziebarth?

A. Yes. As I recall, I was requested to come to the Federal Reserve Bank in Los Angeles and meet Mr. Ziebarth.

Q. Do you recall who else was present?

A. Well, I recall that Jay Taylor was present and I don't know whom else. I can't recall at the time.

Q. Was that before or after you had met Mr. Goodwin? A. I believe it was afterward.

Q. When, by the way, did you first meet Mr. Goodwin?

A. Well, it is difficult to recall, but as far as I can recall, and this may not be accurate, I believe I met him at the Federal Reserve Bank.

Q. Was that before or after he was made manager of the plant? A. That was before.

Q. Now, after you met him there at the Federal Reserve Bank you saw him daily, did you not?

A. Would you repeat that, please?

(Testimony of Howard B. Morrow.)

Q. After you met him at the Federal Reserve Bank and [48] after he became manager of the plant out there you saw him almost daily, did you not? A. Yes.

Q. And worked with him there in the plant?

A. Yes.

Q. Do you recall having seen Mr. Ziebarth at the Morrow Aircraft Company plant at any time during the early part of January of 1944?

Mr. Curtis: You say 1944?

Mr. Veale: Yes, 1944.

Mr. Curtis: That was long after.

The Witness: No.

Q. (By Mr. Veale): Mr. Goodwin was still employed or still operating the plant in January of 1944, was he not? A. Not to my knoweldge.

Q. When did he cease operation?

A. The joint adventure was formed January 19, 1942, I believe.

Q. Maybe I have the wrong date. I am sorry if I have. A. I think you have.

Mr. Curtis: 1943.

The Witness: It is 1943, I am sorry.

Mr. Veale: It would not be 1944. Just a moment, your Honor. January of 1943?

The Witness: Yes. Now, what was the question, please? [49]

Q. (By Mr. Veale): Did you see Mr. Ziebarth at the Morrow Aircraft plant at any time during the early part of 1943? A. No, I didn't.

Q. Did you have any conservations with Mr.

(Testimony of Howard B. Morrow.)

Goodwin at the Morrow Aircraft plant during the early part of January 1943 with reference to the necessity of getting more money? A. Yes.

Q. Do you recall any particular conversation?

A. May I qualify that statement? I did see Mr. Goodwin and discussed the necessity of getting more money but I cannot say that it was during the early part of January 1943.

Q. Do you recall the date when the Ziebarth-Morrow Aircraft Corporation joint adventure became effective?

A. Yes. It became effective January 19, 1943.

Q. These conversations that you had with Mr. Goodwin then were either prior or after that time?

A. They would necessarily be prior.

Q. Prior? How long prior?

A. You mean the conversation relative to the necessity of getting additional funds?

Q. Yes.

A. Well, those conversations would have been held prior [50] to the time of forming the joint adventure.

Q. Do you recall how many such conversations you may have had with Mr. Goodwin concerning those matters? A. No, I don't know.

Q. Now, on or about January 10, 1943, did you have any conversation with either Mr. Goodwin or Mr. McCook with reference to the Ziebarth joint adventure? A. You say did I?

Q. Yes.

(Testimony of Howard B. Morrow.)

A. Mr. Veale, you are asking me to state—you are asking me if I had certain conversations on certain dates.

The Court: No, he did not. He asked you if you had any with those men. Read the question.

(Question read.)

The Witness: To be perfectly honest I cannot recall whether I had a conversation with those two gentlemen on that date.

Q. (By Mr. Veale): To refresh your memory, Mr. Morrow, I show you Plaintiff's Exhibit 1, which has already been introduced in evidence, and which you say you signed. Will you look at that?

A. Now, what is your question?

Q. Now, the question is, did you have any conversations with either Mr. Goodwin or Mr. McCook on or about January 10, 1943, with reference to the Ziebarth joint adventure? [51]

A. To my knowledge, I had no conversation with Mr. McCook.

Q. You did not?

A. I do rather hazily recall Mr. Goodwin presented that letter to me and asked me to sign it.

Q. And I believe you already testified that that is your signature? A. That is correct.

Q. You transacted business with the American National Bank for some years, did you not, Mr. Morrow? A. Yes, I have.

Q. You know Mr. McCook quite well?

A. I know him reasonably well.

(Testimony of Howard B. Morrow.)

Q. You have been a customer there at the bank for a good long while?

A. Well, prior to that time I had been a customer there for possibly a year and a half.

Q. You knew, did you not, Mr. Morrow,—I will withdraw the question.

At or about the time that we are now discussing, that is to say in the latter part of 1942 and the early part of 1943, you were the majority stockholder of the Morrow Aircraft Corporation, were you not?

A. I was the principal stockholder. I don't know what "majority" means. [52]

Q. You owned the greater part of the stock, didn't you? A. Yes, I did.

Q. And you were familiar—and by the way, you were the president of the concern?

A. That is correct.

Q. And you were familiar with all of its business?

A. Well, generally speaking I was. I would not say I was familiar with all of the business.

The Court: You thought you were, anyhow, didn't you?

Q. (By Mr. Veale): You knew in the early part—or, rather, in the month of November, 1942, you knew that the Morrow Aircraft Company was obliged to have additional funds with which to operate, didn't you?

The Court: That has been asked and answered, counsel, I believe.

(Testimony of Howard B. Morrow.)

Q. (By Mr. Veale): You didn't get along too well with Mr. Goodwin, did you?

A. No, I didn't.

Q. Isn't it a fact, Mr. Morrow, that you were anxious and willing to engage in the Ziebarth joint adventure because it would give the concern more money and would get rid of Mr. Goodwin.

A. No, sir, I don't.

Mr. Curtis: Just a moment.

Q. (By Mr. Veale): That is not true? [53]

A. No.

Q. Did you know that the Morrow Aircraft Company would as a result of the Ziebarth joint adventure, put more cash into the affairs?

A. Did I know that?

Q. Yes.

A. Well, that was a statement—that statement is a little misleading if I may say so.

Q. I don't intend to mislead you. What are the facts with respect to that?

A. Well, the facts are these. That the Ziebarths were not putting money into the Morrow Aircraft corporation. They were taking over the operation of the corporation's business, handling their own money in their own way. And at the time they took over the corporation no longer had any say as to the management or conduct of the business and the money that Ziebarth invested they invested themselves and controlled themselves. If you see what I mean.

The Court: That relieved you, did it not?

(Testimony of Howard B. Morrow.)

The Witness: It relieved me as far as being the president of the corporation.

The Court: Relieved you of the worries of the finances too, did it not?

The Witness: Yes, I would say so.

The Court: In other words, you considered it advantageous [54] to you, did you not, or you would not have entered into it?

The Witness: Well, the corporation was in pretty desperate circumstances at that time and——

The Court: And you did it to try to pull your corporation out of the hole, didn't you?

The Witness: Yes; but at that time our first consideration was to continue to make articles that would be of assistance in the war effort and the corporation or myself were really secondary at that time.

If you can recall along about 1942 practically everybody was hysterical in their desire to be of assistance to the United States Government and our only consideration was to continue to make more and better articles which would be of assistance in the prosecution of the war. I don't know if that is correct English, but that is the idea.

The Court: But at the same time you considered this arrangement which you were entering into was of advantage to the corporation in order to carry out its objectives?

The Witness: That is correct.

Q. (By Mr. Veale): As a result of the activities of the joint adventure is it not true, Mr. Morrow,

(Testimony of Howard B. Morrow.)

that certain dividends were paid to the Morrow Aircraft Company which in turn were forwarded for payment on this note? A. That is correct.

Q. That was the result of the efforts of the joint [55] adventure, Mr. Ziebarth's management?

A. Yes.

Q. And you did benefit to that extent?

A. No. What do you mean by "You"?

Q. The corporation?

A. The corporation benefited to the extent of the amount paid by Ziebarth and which was relayed to the bank in payment of the note.

Q. During the time that the Ziebarth joint adventure was in operation were you, as the guarantor, called upon at any time to make any payments?

A. No.

Q. Getting back for a moment to the times and occasions when you say that you and Mr. Goodwin had certain conversations there at the plant with reference to the Ziebarth adventure. What was the nature of those conversations and who else was present, if anyone?

The Court: What conversations are you referring to, counsel?

Mr. Veale: Conversations during the early part of January 1943.

The Court: They might have been talking about the weather. I am not interested in that.

Mr. Veale: Sir?

The Court: They may have been talking about the weather [56] at that time.

(Testimony of Howard B. Morrow.)

Mr. Veale: I am trying to limit it, your Honor, to the Ziebarth plan. That is what I tried to ask him.

The Witness: Mr. Veale, as nearly as I can recall, in the early part of January 1943 I was on the verge of a nervous breakdown and I was sent away from Rialto, to go out and get some rest, and I went to Miami, Florida, to try and recuperate. I don't recall the exact time that I left Rialto but I think it was prior to January 10th. Still, it couldn't have been because I signed that paper at that time.

Q. (By Mr. Veale): That is what I was thinking but it is——

A. But it is quite possible that paper was sent to me in Miami and I may have signed it there.

Q. Why, isn't it a fact, Mr. Morrow, that during the period beginning approximately November 15, 1942, to and through January 19, 1943, you were called upon by Mr. McCook of the American National Bank to sign innumerable papers with reference to this particular transaction?

A. The term "innumerable" is rather——

Q. Well, many. Put it that way. Many papers with reference to this transaction.

Mr. Curtis: I am going to object to that, your Honor, on the ground the papers themselves are the best evidence.

Mr. Veale: Well, I don't know. He has got to answer [57] yet whether he signed the papers.

Mr. Curtis: He said he signed a letter.

Mr. Veale: Well——

(Testimony of Howard B. Morrow.)

The Witness: I signed some papers, I will agree.

Mr. Curtis: Just a minute. Let us get this ironed out.

The Court: He answered the question, and saved me the necessity of a ruling.

Mr. Curtis: What was the answer?

The Witness: I said I signed some papers.

Q. (By Mr. Veale): I don't know whether I asked you this or not. I believe I did. Yes, I will withdraw that. When was the joint adventure terminated?

A. The joint adventure was terminated January 19, 1946.

Mr. Veale: I believe that is all.

Redirect Examination

By Mr. Curtis:

Q. Mr. Morrow, I think you testified at the last hearing that Mr. Goodwin came to Rialto as the manager probably near the end of October 1942?

A. That is approximately right.

Q. That is your best recollection?

A. Yes.

Q. At that time was there in process an application for an additional loan? [58]

A. Yes.

Q. In other words, the loan of \$125,000 which was combined with the \$100,000, which the company already owed the American National Bank, was consolidated in a note dated toward the middle of November 1942?

A. Correct.

Q. And it was with respect to that loan and that

(Testimony of Howard B. Morrow.)

note that the guarantee which we are now concerned with, applied? A. Yes.

Q. So that when Mr. Goodwin came in October negotiations had already been undertaken to obtain that loan by the officials of the Morrow Aircraft Corporation? A. That is correct.

Q. And before Mr. Goodwin came he assisted further and was active in the consummation of that loan? A. That is right.

Q. At least up until the time that Mr. Goodwin came to Rialto you were active in the affairs of the corporation, were you not? A. I was.

Q. And how long did you continue in active control of the operations of the corporation?

A. A few days after Mr. Goodwin became manager.

Q. I have asked this before but let me just review the thing up to this point. You had a conversation with [59] Colonel Taylor at which time you testified he told you in no uncertain terms that Mr. Goodwin was the manager and was to be in absolute control of the operations in Rialto?

A. That is right.

Q. When with respect to that conversation did your active participation in the corporation cease?

A. Immediately.

Q. You don't recall the date upon which you had that conversation, approximately when it took place?

A. No, I don't. It was—I could hazard a guess. The Court: Well, let us not guess.

The Witness: All right.

(Testimony of Howard B. Morrow.)

Q. (By Mr. Curtis): Now, you have testified that you signed the letter dated January 10, 1943, and you also testified that during the period immediately preceding the execution of the joint adventure you signed numerous papers. Do you recall any other paper you signed?

A. No, I don't.

Mr. Curtis: That is all.

Mr. Veale: That is all.

The Court: That is all.

Mr. Veale: At this point, your Honor, Mr. Curtis has called my attention to the fact that the guarantee contract in question has not yet been introduced in evidence. I should like to offer that.

The Court: There is a copy attached to the pleading.

Mr. Veale: May the copy attached to the pleadings be deemed as an exhibit?

Mr. Curtis: I have no objection.

The Court: You mean the guarantee?

Mr. Veale: Yes.

The Court: It is admitted in the answer, is it not, the execution of it?

Mr. Curtis: There is reference in the transcript. That is the thing I had in mind. It is to the effect that he desired to introduce in evidence as Plaintiff's Exhibit 1 the guarantee, but it was never done. I don't know whether he wants to introduce it or not instead of it.

The Court: That is the letter?

Mr. Curtis: The letter went in as Exhibit 1, but

at the time I introduced it he said, I think, it should be Exhibit 2.

The Court: Have you a copy to introduce?

Mr. Veale: I think I have one more copy.

The Court: Or can it be stipulated that the copy attached to the complaint is a true and correct copy and be deemed in evidence?

Mr. Curtis: I will so stipulate.

Mr. Veale: That is what I had in mind, your Honor.

The primary obligation, that is to say, the notice, which was executed in November and which is the motive for the [61] guarantee contract, is not yet introduced in evidence. Mr. Curtis has very courteously consented to stipulate that the note as set forth in the copy of the chattel mortgage, which is a part of the pleadings in this case——

The Court: Part of the defendant's answer?

Mr. Veale: Yes; may be considered as being offered. I understand, however, he does want to make an objection.

Mr. Curtis: I want to make an objection to that offer, your Honor, on the ground that I have previously stated, that there is a fatal variance between the note and the guarantee in that the guarantee refers to a note of even date, and the date of the guarantee being——

The Court: But I understand you do not object to the introduction of the note because it refers to a copy that is attached to your pleadings but only as to the materiality?

Mr. Curtis: Yes.

The Court: I am going to overrule the objection because that will be one of the questions the court will have to pass upon.

Mr. Curtis: I wanted the record to be clear on it.

Another thing, I would like to call your Honor's attention—in fact, I would like to inquire whether or not the copy of the note, which appears in the pleadings, indicates who signed the note. Now, the copy I have in my file is an unsigned copy. [62]

The Court: And the one filed likewise is an unsigned copy.

Mr. Curtis: I do not know that it makes any difference but we will stipulate that it was duly signed by officers of the corporation.

Mr. Veale: That is agreeable.

The Court: You may proceed.

Mr. Veale: Mr. Goodwin, will you take the stand, please?

GUY GOODWIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Guy L. Goodwin.

The Court: You stipulate it was duly executed by the corporation?

Mr. Curtis: Yes.

Mr. Veale: Yes.

(Testimony of Guy Goodwin.)

Direct Examination

By Mr. Veale:

Q. Mr. Goodwin, you of course know Mr. Morrow? A. I do.

Q. And Mr. Curtis? A. I do.

Q. And Mr. McCook? [63] A. Yes, sir.

Q. Mr. Goodwin, did you have occasion in the fall of 1942 to take over the managership of the Morrow Aircraft Corporation? A. I did.

Q. At that particular time did you meet Mr. Morrow? A. I did.

Q. Do you recall what date you took over or approximately what date it was?

A. I know approximately the date. It might help if I would review the situation which resulted in my going down to the Morrow Aircraft and taking over.

Q. I think that is pretty generally understood already, Mr. Goodwin.

The Court: I would like to hear the story.

Q. (By Mr. Veale): All right, I beg your pardon.

Mr. Curtis: I submit it is hearsay.

Mr. Veale: Much of it is hearsay.

The Court: Then fix the date as near as possible to the best of your memory.

The Witness: I went down to the Morrow Aircraft to assist in the management of the company the latter part of October, 1942. The actual date on which I was to assume the management was, I

(Testimony of Guy Goodwin.)

believe, as of November 15th. I believe I can refresh—I can determine the exact date if I may have access to the files which I brought with me.

Q. (By Mr. Veale): Yes, if it refreshes your memory you may refer to them.

A. My responsibilities with respect to the funds and the expenditures of the Morrow Aircraft Corporation commenced as of November 19, 1942. Prior to that time I had been assisting Mr. Morrow in connection with the business and trying to work with the creditors and in an effort to determine as to whether or not the creditors would not press action so that the company might be thrown into receivership as the bank was not disposed to advance monies unless they knew that they—unless they had reasonable assurance that some of the creditors, one or more of the creditors, would not step in and disturb the operation of the company.

Q. (By Mr. Veale): Did you have success in that effort?

The Court: What do we care whether he had successor not? What I am interested in is what occurred relative to this particular transaction.

Mr. Veale: It was a material benefit flowing not only to the Morrow Aircraft Corporation but to this defendant.

Mr. Curtis: What difference would it make?

The Court: It seems to me whether they had success or not is not of any importance here. What I am interested in is this. Mr. Morrow has pre-

(Testimony of Guy Goodwin.)

sented a picture here that he was the pawn of Mr. Goodwin. [65]

Mr. Veale: I appreciate that.

The Court: And I want to find out whether Mr. Morrow had anything to do with the execution of these various papers. I assume the real question is whether he had anything to do with the agreement to withhold foreclosure.

Mr. Veale: Very well, your Honor.

Q. Mr. Goodwin, after you assumed the management of the corporation did Mr. Morrow remain there and cooperate with you?

A. He was at the plant almost daily. I endeavored to cooperate. The difficulty was the organization could not work with two bosses. One of us had to assume the responsibility because otherwise it would have meant conflicts in instructions to the employees.

Mr. Morrow evidenced every desire to cooperate in the business of the company. There was a difference of opinion between us as to how the affairs of the company should be conducted, resulting in misunderstandings, which were cleared up by Major Taylor, by an interview with Mr. Morrow and me, followed by a letter addressed to Mr. Morrow under date of December 2nd, 1942, of which a copy was forwarded to me, whereby the complete management was delegated to me.

Q. (By Mr. Veale): What was the date of that letter?

(Testimony of Guy Goodwin.)

A. December 2nd, 1942. I have a copy of the letter signed by J. I. Taylor, Major, United States Army. [66]

Q. After you assumed the management, total management, did you have occasion to meet Mr. Ziebarth?

A. I had met Mr. Ziebarth prior to the time that I took over the complete management and during, I believe, November 1942, a joint adventure was entered into with Mr. Ziebarth for the manufacture of a certain tank, an expendable tank that had been developed by the Morrow Aircraft Corporation.

A contract was prepared. I called in the late Paul M. Gregg as attorney to represent Morrow Aircraft and to advise us in connection with that contract, so that there was a joint adventure in operation during, I believe, part of November, but I am sure during December between Morrow Aircraft and Ziebarth whereby space was set aside to Ziebarth.

The drawings and equipment were made available to him and he paid the cost of the experimental work and the development work in connection with this tank.

He had his own representatives at the plant. His business was under the direction of Mr. Murray Carr, one of his associates or employees, so that we were in constant touch with the Ziebarth organization during the major portion of December at least.

(Testimony of Guy Goodwin.)

Q. At or about that time did you have any—or, did you undertake to make any arrangement with Mr. Ziebarth with reference to a second joint adventure?

A. I did. I realize that—— [67]

The Court: Just a moment. Isn't the court primarily interested in the surrounding circumstances of the execution of this letter of January 10th?

Mr. Veale: Yes, your Honor. I am trying to get up to that but I think your Honor will be obliged in the end to know all of the facts and circumstances that surrounded these matters. And I think the Government is entitled to have your Honor know those things. They are certainly material. I have some authorities which I am going to present to your Honor which definitely establishes that.

The Court: I know, but this witness's answers are in generalities. That is no criticism of the witness, but the nature of the questions bring forth general answers.

Mr. Veale: I propose to show by this witness the fact that Mr. Morrow was there, had knowledge of all these things, did not object to it and eventually signed this letter dated January 10th, and eventually signed—and up to this good hour, to the time he filed his answer in this case, he had not made any objection to it. That is what I propose to show.

The Court: Well, the only difference between the court and you is that your method of trying to establish that differs from mine. I am not trying to

(Testimony of Guy Goodwin.)

preclude the establishment of it but can it not be ascertained through questions that bring forth the dealings that Mr. Morrow had with the Ziebarth Company whereby this joint adventure was entered into? [68]

Mr. Veale: That is precisely what I am trying to get around to.

The Court: Then why don't you ask him? Get down to that.

Mr. Veale: I want to get it into the record, your Honor, and I think I am entitled to that.

The Court: All right, go ahead.

Q. (By Mr. Veale): Was Mr. Ziebarth present there at the Morrow Aircraft Company at any time after you initiated the arrangements with reference to the second joint adventure?

A. I do not remember.

Q. Did you finally arrange for the second joint adventure? A. Yes.

Q. When and where did that take place?

A. To answer directly——

The Court: Did Mr. Morrow participate in the negotiations?

The Witness: In the preliminary negotiations Mr. Morrow did not participate. The preliminary negotiations were at my suggestion, instituted by Major Taylor with Mr. Ziebarth.

Q. (By Mr. Veale): All right. Let us get down to those parts of the arrangement in which Mr. Morrow did participate.

(Testimony of Guy Goodwin.)

The Court: And that is where I am trying to get you, counsel. [69]

Mr. Veale: I have been leading up to that all along. I have been trying my best to get up to the trough.

Q. Tell us that portion of the arrangements with Mr. Ziebarth in which Mr. Morrow did participate.

A. I cannot do that. My memory is not clear enough with respect to the meetings that occurred at that time to give you a definite answer.

Mr. Morrow did not attend all the meetings. Some of the meetings were attended by his brother.

Q. Did Mr. Morrow attend any of the meetings?

A. Not according to any notes that I retained and which I have in my files.

Q. Do you recall having had any conversations with Mr. Morrow during the period beginning January 2nd, 1943, to and including January 19, 1943?

A. I do not remember any definite conversations with Mr. Morrow. During a portion of that period I believe that he was out of the state.

Q. Can you recall any occasion during the period I have set forth when you and Mr. Morrow, Mr. Howard Morrow, there at the Morrow Aircraft Corporation, discussed any phase of the Ziebarth second joint adventure?

A. May I have that question again, please?

The Court: Read the question.

(Question read.) [70]

(Testimony of Guy Goodwin.)

A. I do not recall any definite occasion during that period when the matter was discussed with Mr. Morrow.

Q. Well, what do you mean by "definite," Mr. Goodwin?

A. As I previously stated, Mr. Morrow was there only a portion of the time after the first of the year—that is, January 1st, 1943, and my recollection is very hazy with respect to conversations with him during that period. We were in close touch when he was in the office but I cannot state that he was there during that period of time. I do know that he did not attend some of the meetings. I have records showing that his brother attended one of the meetings prior to January 19th, subsequent to the first of the year when the matter was discussed, fully discussed.

Q. Do you know of the occasion or any occasion when Mr. Morrow signed up necessary documents to put into force and effect the second joint adventure?

Mr. Curtis: Just a moment. That calls for a conclusion and I object to it on that ground. Furthermore, the instruments, if any, which he signed are the best evidence.

The Court: That objection is good, counsel.

Q. (By Mr. Veale): Did Mr. Morrow at any time during the time when you were connected with the Morrow Aircraft Corporation as its manager, and particularly during the month of January 1943, object to you or make any objections to you concern-

(Testimony of Guy Goodwin.)

ing the execution of the documents with reference to [71] the second joint adventure?

A. I do not remember of any.

Q. You and Mr. Morrow——

The Court: In other words, as I understand, he may have objected and you do not remember it?

The Witness: That is correct, your Honor. You will appreciate that considerable time has elapsed and——

The Court: Just a moment.

The Witness: It is difficult for me——

The Court: I am showing you plaintiff's Exhibit 1. Are you acquainted with that letter?

The Witness: I believe I have a copy of that letter in my file.

The Court: Are you familiar with the circumstances under which it was executed?

The Witness: Yes. I recall that the letter was prepared for his signature.

The Court: Did you prepare the letter?

The Witness: I did not prepare the letter.

The Court: Do you remember any discussion concerning the execution of that letter?

The Witness: I do not.

The Court: You may proceed.

Mr. Veale: That is all, Mr. Goodwin. [72]

Cross-Examination

By Mr. Curtis:

Q. Mr. Goodwin, I am not sure that we are all clear about these two joint adventures. There was

(Testimony of Guy Goodwin.)

a first joint adventure which related to the tank construction, that joint adventure being one between Morrow Aircraft and the Ziebarth Company?

A. That is correct.

Q. For the construction of these expendable tanks. That was a joint adventure which related specifically to that one phase of operation only?

A. That is correct.

Q. Isn't that true? A. Yes.

Q. And that the Morrow Aircraft Corporation carried on concurrently with the existence of that joint adventure with other operations?

A. That is correct.

Q. Now, the joint adventure that we are talking about here is the second joint adventure, is it not? In other words, it is a new joint adventure?

A. The one entered into on January 19th?

Q. January 19th, yes.

A. Was a new joint adventure which I believe nullified it or eliminated the original contract or the original contract [73] that was taken over under it.

Q. So that the joint adventure that was entered into in January, January 19th, 1943, was a complete joint adventure? By that I mean the entire operations of Morrow Aircraft were turned over to this new joint adventure and that the Ziebarth people then managed it under the new joint adventure agreement of January 19th?

A. That is correct, but I think that is—I think that is substantially correct. I would have one

(Testimony of Guy Goodwin.)

technical question—whether the Victory Trainer was included, which was owned by the Morrow Aircraft Company, whether that was actually included under the second joint adventure.

Q. I appreciate that. What I am getting at is up until the time you took the stand we had had no discussion of the joint adventure—first joint adventure. The second joint adventure, the one you refer to as the second joint adventure, was the one embodied in the agreement of January 19th, 1943?

A. That is correct.

Q. And it was in connection with that joint adventure that the bank as one of the parties of that agreement, agreed to withhold foreclosure upon their chattel mortgage during the period of that second joint adventure?

A. That is correct.

Mr. Curtis: May I see the copy of the letter which you [74] received from Colonel Taylor? Do you have any objection to us putting it into evidence? I would like to offer it, your Honor, if I may.

The Court: What is the date of it?

Mr. Curtis: May I ask some further questions? This letter is dated December 2nd, 1942.

Q. You received it through the mail, did you?

A. I did so.

Q. Do you know Colonel Taylor or Major Taylor's signature?

(Testimony of Guy Goodwin.)

A. I was reasonably familiar with it at that time.

Q. Anyway, you received——

A. I cannot answer that.

Q. You received this letter through the mail?

The Court: What materiality is the letter?

Mr. Curtis: It shows, your Honor, definitely the control which Mr. Goodwin was to have.

Mr. Veale: That is not denied.

The Court: Mr. Goodwin so testified.

Mr. Curtis: May I read the letter and your Honor can rule on it, or would your Honor like to read it? It merely bears out what Mr. Goodwin has testified.

The Court: According to your own statement there are only two questions of fact involved and those are whether Mr. Morrow consented to this waiver of security, and, secondly, [75] the question as to whether the note of “even date” and so forth——

Mr. Curtis: My point here is that there has been no actual consent. The only way——

The Court: I understand, but——

Mr. Curtis: The implied consent is the thing we will be concerned with. “Can the consent of Mr. Morrow be implied from his conduct?”

Now, the only thing that has been shown here is that although he did have knowledge of the transaction and that he signed this letter dated January 10th, I will argue that that letter in and of itself is surely no consent on the part of anyone. It does

(Testimony of Guy Goodwin.)

not purport to be a consent and so that in order to explain further the letter and what was intended by it and what the purpose was in signing it I think relates back to what position Mr. Morrow had in the operation.

He testified that he was a rubber stamp of the War Department here. This letter would bear that out.

The Court: Counsel, it is easier to admit it than to argue about it.

Mr. Curtis: I offer as Defendant's Exhibit C, I believe it is.

Mr. Veale: Objected to as immaterial and irrelevant.

The Court: I will let it in for what it is worth.

(The document referred to was marked as Defendant's Exhibit A, and was received in evidence.) [76]

Mr. Curtis: I think the transcript states that the chattel mortgage and the consent and waiver would be marked Defendant's Exhibit A and B. They haven't been so marked.

The Court: They have been introduced by stipulation as part of the pleadings and in the answer, and are deemed to be in evidence without marking as exhibits.

Mr. Curtis: Then I offer this for whatever number it is.

The Clerk: Defendant's Exhibit A.

Mr. Curtis: No further questions.

Mr. Veale: Just one further question.

(Testimony of Guy Goodwin.)

Redirect Examination

By Mr. Veale:

Q. Mr. Goodwin, while you were acting as manager of the Morrow Aircraft Corporation, while Mr. Morrow was president, were you on speaking terms?

Mr. Curtis: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Yes.

Q. (By Mr. Veale): Mr. Morrow was quite agreeable, was he not?

Mr. Curtis: The same objection.

The Court: That calls for a conclusion.

Mr. Veale: As manager—— [77]

The Court: You were carrying on a diplomatic relationship, were you?

The Witness: Yes, your Honor.

The Court: At a distance?

The Witness: No.

Q. (By Mr. Veale): As manager of the plant——

The Court: Just a moment. Let me ask a question here. Did you and Mr. Morrow discuss the common problems of the company?

The Witness: Yes, your Honor.

The Court: With restraint or was it with the idea of helping each other or keeping him informed?

The Witness: (No answer.)

(Testimony of Guy Goodwin.)

The Court: In other words, I have gotten from Mr. Morrow's attitude that you were the top sergeant out there with a bayonet running that plant and Mr. Morrow only stuck his head in there when you were not looking.

Mr. Curtis: If your Honor please, I do not wish to object to your Honor's question but——

The Court: That is what Mr. Morrow's testimony sums up to.

Mr. Curtis: I would like to refer to the transcript as to what he actually stated.

The Court: I am trying to get their method of doing business. [78]

The Witness: Your Honor, we were in a small building. Mr. Morrow had lived with the people in the organization. They were his close friends. He had very definite ideas about how the business should be conducted. He realized that as well as I did that I had no particular knowledge of the aircraft business; that I was relying more upon general business judgment with respect to the conduct of the affairs of the business. There was a difference of attitude. Mr. Morrow was optimistic about the future possibilities of the company. I was pessimistic due to the fact that it was up to me to see that the overdrafts were minimized and that the funds were available to carry on the business of the company.

Mr. Morrow and his associates wanted to sell additional seats and items which the company was offering. I had a serious controversy with Mr. Mor-

(Testimony of Guy Goodwin.)

row and his associates as I did not see where the funds were going to be available with which we could manufacture the seats and, accordingly, we came to a point where it was very difficult for us to sit down around the table and arrive at any joint agreement with respect to the business.

The Court: When did that condition exist? On January 10th when this Ziebarth arrangement was made with the bank to waive foreclosure?

The Witness: The condition existed at that time and subsequent, [79] for practically the entire period subsequent to December 2nd, 1942.

The Court: Then as I understand it you, as a matter of fact, handled the arrangements with the bank for this Ziebarth second joint adventure?

The Witness: I cooperated. I handled the major portion of it, some of the details, but Mr. Curtis, attorney for the Morrow Aircraft, handled the legal end of it and the requirements were outlined by the Federal Reserve Bank—that is the requirements with respect to the papers which were to be executed and as they were the loaning agency, as they represented the—they were handling the matter through the San Bernardino bank, through Mr. McCook's bank, so the technical details were largely outlined by Mr. McCauslin and Major Taylor and their other people at the Federal Reserve Bank.

The Court: As I understand it, Mr. Curtis was representing Mr. Morrow?

(Testimony of Guy Goodwin.)

The Witness: Mr. Curtis sat in on the preparation of the agreements. He went to Long Beach to work with Mr. Ball, the attorney for Ziebarth, and attended two meetings that I am sure of, at the Federal Reserve Bank.

Mr. Curtis: Your Honor, I think your Honor mis-stated the witness's statement. Perhaps you did not do it intentionally. The witness stated that Mr. Curtis was acting as the [80] attorney for Morrow Aircraft Company and you said "Mr. Curtis, attorney for Mr. Morrow." You meant by that, I am sure, the Morrow Aircraft Company?

The Court: Yes.

Mr. Curtis: There is no testimony here that I was representing Howard B. Morrow personally.

The Witness: Mr. Curtis was employed by the Morrow Aircraft Company to do that work.

The Court: That is all. Any further questions?

Mr. Veale: That is the line of questioning I wanted to go into.

The Court: And——

Mr. Curtis: I would like to ask another question.

The Court: Very Well.

Recross-Examination

By Mr. Curtis:

Q. Mr. Goodwin, you were there at the time this loan for \$225,000 was consummated, were you not—that is, you were manager out there?

(Testimony of Guy Goodwin.)

A. I was made manager technically, I believe, when the loan had been consummated.

Q. But you were familiar with all the details?

A. I was familiar with the major portion of the details. I sat in on some of the meetings at the bank.

Q. And were you familiar with the security which the [81] bank took as security for that loan?

A. Yes.

Q. That included a chattel mortgage on all of the machinery and equipment for one thing, did it not? A. That is correct.

Q. Took an assignment of all the accounts receivable and the proceeds from any future production as security?

The Court: I think it could be assumed the bank took their eye teeth if it could get them.

The Witness: I cannot answer definitely the question you asked.

Q. (By Mr. Curtis): Do you recall they took a pledge of all of Mr. Howard Morrow's stock and Frank Morrow's stock in the corporation which constituted about seventy per cent of the capital stock—total capital stock? A. I do.

Q. And do you further recall that the note was a demand note? A. I do not.

Mr. Curtis: The note, of course, is in evidence here and speaks for itself. That is all.

Mr. Veale: That is all, Mr. Goodwin.

If the court please, I think Mr. Goodwin is anxious to get away from the City. He has a trip

planned, and as far as the Government is concerned we might excuse him. [82]

Mr. Curtis: We will be agreeable that he be excused.

Mr. Veale: Mr. McCook, will you take the stand?

ERNEST MCCOOK

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Ernest McCook.

Direct Examination

By Mr. Veale:

Q. Mr. McCook, you are affiliated with the American National Bank of San Bernardino?

A. I am.

Q. And were so engaged in the years 1942 and '43? A. I was.

Q. Do you know Mr. Morrow?

A. Yes, sir.

Q. Howard B. Morrow? A. Yes.

Q. He has been a customer of the bank there for some time, has he? A. He has.

Q. Mr. McCook, are you familiar with the joint adventure known as the Ziebarth-Morrow Aircraft joint adventure which was entered into in January of 1943? [83]

A. I know the agreement.

Q. That was handled through the American National Bank, was it?

(Testimony of Ernest McCook.)

A. An agreement was sent to us for signature.

Q. You also received from time to time documents for the signature of Mr. Morrow, did you not?

A. I did.

Q. I show you Plaintiff's Exhibit 1, which is a letter dated January 10th, 1943, addressed to the American National Bank and signed by Howard Morrow—signed by Morrow Aircraft Corporation by Howard Morrow. Are you familiar with that letter?

A. I have a copy of this letter in my file.

Q. Do you know where that letter was signed, Mr. McCook?

A. I have checked with my secretary against her typewriter. There is no identifying mark on the letterhead and to the best of my knowledge it was prepared on the bank typewriter.

Q. Do you have any independent recollection of Mr. Howard Morrow coming into the bank with reference to the execution of any document concerning the Ziebarth adventure?

A. I don't recall any.

Q. Do you recall any occasion in the early part of January, 1943, when you had any conversation with Mr. Howard [84] Morrow concerning the Ziebarth joint adventure?

A. I do not.

Q. Do you know Mr. Curtis?

A. I do.

Q. Did you have any conversations with Mr.

(Testimony of Ernest McCook.)

Curtis there at the bank with reference to the Ziebarth-Morrow Aircraft joint adventure?

A. I don't recall any.

Q. Did you participate in any conference at the Federal Reserve Bank where this joint adventure was being discussed?

A. My first knowledge of the agreement was a call from the Federal Reserve Bank to attend a meeting at the Federal Reserve, which I attended.

Q. Do you recall who was present at that time?

A. Well, I recall Ambrose, head of the Federal Reserve Bank, and Major Taylor and Mr. Finley Ziebarth. I don't recall anyone else.

The Court: Do you remember whether Jesse Curtis was there?

The Witness: I can't state. I can't recall.

The Court: You do not recall anything about the release of this security, that is to withhold foreclosure or any of the transactions about that? Don't you realize that your bank may be responsible for a release of securities? [85]

The Witness: I testified the agreement was sent to us for signature.

The Court: But you said this letter was written on your stationery, probably under instructions.

The Witness: To explain that——

The Court: You knew there was a guarantee by Mr. Morrow, didn't you?

The Witness: I did.

The Court: And you had that?

The Witness: Yes.

(Testimony of Ernest McCook.)

The Court: And you also knew that that guarantee might be affected by any change in the securities, did you not?

The Witness: Right.

The Court: And did you make any inquiry in that respect?

The Witness: I might explain that by saying this particular loan originated through our bank. We had a small interest in it. The principal money was, of course, invested by the War Department and the Federal Reserve and we acted merely as, you might say, an agent. Documents originated through the Federal Reserve and were simply sent to us, sometimes in the form of a memorandum to have written and signed. We took no action.

The Court: You don't remember whether Mr. Morrow signed that guarantee in your bank or not, then? [86]

The Witness: No, sir, I don't.

The Court: Don't you recall any of the circumstances?

The Witness: I don't recall it, I do not, no, sir.

The Court: That is all.

Mr. Veale: No further questions.

Cross-Examination

By Mr. Curtis:

Q. Mr. McCook, you do recall that in November 1942 the Morrow Aircraft Corporation executed to the American National Bank a note in favor of the

(Testimony of Ernest McCook.)

American National Bank in the sum of \$225,000, isn't that right?

The Court: How much?

Mr. Curtis: \$225,000.

A. I don't remember the exact date. I remember the note.

Q. You remember there was a transaction at that approximate time? A. I do.

Q. And that in connection therewith at about the same time, the guarantee, which has been set forth in the complaint here, was executed by Howard Morrow? A. Yes.

Q. There were two guarantees but one of them is executed by Howard Morrow?

A. That is right. [87]

Q. Do you recall what security the bank took for that note?

A. We had an assignment of all the accounts receivable, a chattel mortgage on all the equipment. We had the guarantees.

Q. And you had the pledge of the stock?

A. Pledge of the stock.

Q. And that stock was——

The Court: How did you come to let them have their right eye?

The Witness: They talked us out of it.

Q. (By Mr. Curtis): That stock was 70 per cent of the capital stock in the Morrow Aircraft Corporation and presumably all the stock that Howard Morrow and Frank Morrow held?

A. That is right.

(Testimony of Ernest McCook.)

Q. The bank also took as security an assignment of all proceeds from orders or, in fact, all income that might be derived by the corporation in the future until the loan was paid, isn't that a fact?

A. Accounts receivable, present and future, I believe.

Q. And an assignment of all the proceeds from contracts then in existence?

A. That is right.

Q. Now, this money—furthermore, the note was a note [88] payable on demand or if no demand be made, then on a due date as set forth in the note?

A. I believe it was.

Q. Do you recall? A. (No answer.)

Q. So that the bank was in a position in event the officers or Howard Morrow or Frank Morrow did not cooperate in any stage of the game the note could be called and the bank would foreclose on the stock and put in its own officers in order to protect its security?

Mr. Veale: I think the note and chattel mortgage show that sufficiently, your Honor. I think I will have to further object to further testimony along that line.

Q. (By Mr. Curtis): That was the purpose of putting it in there, wasn't it?

Mr. Veale: That is immaterial.

The Court: I think that is immaterial. I think the court knows as a matter of common knowledge that banks like to have demand notes.

Q. (By Mr. Curtis): This loan was made at

(Testimony of Ernest McCook.)

the time when the financial situation was extremely critical as far as Morrow Aircraft Corporation was concerned? A. That is right.

The Court: They needed the money or they would not have borrowed it, counsel. [89]

Mr. Curtis: It was worse than that. There were overdrafts at that time and checks floating around without sufficient funds.

Mr. Veale: I object to counsel flooding the record with his own testimony.

The Court: I don't see what materiality it has. There is only one question here and I do not see that this witness has established anything by his testimony. It is negative testimony.

Q. (By Mr. Curtis): In connection with this joint adventure agreement there were some negotiations, of course, and some discussions as to what the agreement should contain. You said you were called into Los Angeles to a meeting?

A. That is right.

Q. And isn't it a fact that at that meeting Mr. Finley brought up the question of an agreement on the part of the bank to withhold foreclosure during the term of the joint adventure in order that the Ziebarth people might, with some feeling of security, come in and take over the operations? That was discussed at that meeting, was it not?

A. All points in connection with the agreement were discussed at that meeting.

Q. And in fact there were a number of things that came out in that meeting that your bank, of

(Testimony of Ernest McCook.)

course, with the understanding [90] or the consent of the Federal Reserve, would be required to do?

A. That is right.

Q. And it was tentatively agreed, was it not—didn't your bank and didn't the Federal Reserve at that time indicate a willingness to do that—a willingness, for instance, to agree——

The Court: What materiality is their willingness? These negotiations did not get to a written instrument. The only feature that I am interested in is to find out to what extent Mr. Morrow figured in the picture.

Mr. Curtis: I think this, your Honor, and this is my point. I think there is considerable question as to what the meaning of this letter of January 10th is. Aside from whatever that letter may mean, it is my purpose to show, if possible, that that letter was written after the bank, Ziebarth people and the Federal Reserve and the War Department had all agreed as to what the deal was to be and that there was no reliance whatever placed upon this letter. There was no reliance intended. That in their preliminary negotiations they had all agreed to do these things and that this letter, whatever its purpose may have been, did not further the deal and that there was no reliance of any kind upon it.

The Court: The letter speaks for itself, counsel.

Mr. Curtis: For the record, may I make that as an offer [91] of proof?

The Court: Yes, you may make it as an offer of proof.

(Testimony of Ernest McCook.)

Mr. Curtis: I propose, your Honor, to prove by this witness——

The Court: But you understand that this witness—that this witness, and the court knows as a matter of common knowledge, would like to be friendly to you in the transaction. On the other hand, I also recognize that Mr. Morrow is not liable for this \$100,000.

Mr. Curtis: All I want, your Honor, is the facts.

The Court: In other words, I know both you gentlemen and I know your close ties and Mr. Morrow has been a customer of his. On the other hand, this man has his bank to protect from possible liability by releasing the security that he should not have released, if your contention is correct. If that is true, the Government may have a claim against the bank. As a result of that this man is a negative witness. He doesn't want to hurt you and he doesn't want to get himself in trouble.

Mr. Curtis: He is on the witness stand, your Honor.

The Court: I realize that.

Mr. Curtis: And I think my question is within the purview of the direct examination.

The Court: But it isn't. All he has said is that he doesn't know. He testified he went down to a meeting and [92] this agreement was a result of that meeting at the Federal Reserve Bank. He doesn't even know who was present. He doesn't know whether you were present.

(Testimony of Ernest McCook.)

Mr. Curtis: But he recalls that a representative of the Federal Reserve was present and he was present and Mr. Finley was present, and he can surely testify, or at least I am asking him, whether or not he can testify—maybe he cannot—but I am asking him if he can testify as to whether or not there was an agreement among those people at that time, temporarily it is true.

The Court: I think it is immaterial.

Mr. Veale: We will object to the offer of proof on the ground it is incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: I always permit counsel to protect his record, but it is immaterial. We have the agreement here. That is the agreement you have been relying upon for the release of this security.

Mr. Curtis: That is true. I think that is the crux of the situation as we will get to later, but at least for the record, your Honor, I would like to offer to prove by this witness that at that meeting, at a meeting at the Federal Reserve here in Los Angeles, where there was in attendance Mr. McCook, this witness——

The Court: Counsel, suppose they did have negotiations [93] down here and they agreed those things were going to be done? Those were preliminary negotiations leading up to the agreement.

Mr. Curtis: That is true, your Honor.

The Court: And they had to get the consent of the corporation, no matter what they agreed to.

(Testimony of Ernest McCook.)

They had to get the consent of the corporation before they could do what they did do.

Mr. Curtis: What I want to point out, your Honor, is that there was an agreement among themselves to do these things and——

The Court: Well, I am going to hold that is immaterial.

Q. (By Mr. Curtis): Mr. McCook, do you know who wrote that letter? I am speaking now of Plaintiff's Exhibit 1. You say it was prepared on a typewriter in the bank. Do you know who prepared the copy or who dictated it?

A. This letter before me now?

Q. Yes. A. I do not.

Q. You don't know whether you dictated it or whether the Federal Reserve Bank or who did?

A. I do not.

The Court: Can't you tell by the dictation whether it is yours?

The Witness: It doesn't appear to be mine. [94]

The Court: You don't think it is yours?

The Witness: I will say that.

Q. (By Mr. Curtis): Do you know, Mr. McCook——

The Court: Just a moment.

The Witness: I will say material was sometimes forwarded in memorandum form, for instance, from the Federal Reserve for re-write by us but I couldn't say that that was the case here.

(Testimony of Ernest McCook.)

The Court: You don't know whether that was the case here or not?

The Witness: I do not.

Q. (By Mr. Curtis): Do you know what the purpose of that letter was, Mr. McCook?

A. I think it would be obvious by the letter itself.

Q. Other than the contents of the letter you have no idea what the purpose was?

Mr. Veale: It speaks for itself.

Mr. Curtis: The letter does not say anything. That is the reason I would like to know—it is very ambiguous to say the least. May I continue with the examination?

Q. Now, Mr. McCook, your bank did execute what is called a consent and waiver which has been—which is a part of the file. I will show you Exhibit B attached to the answer—no, it is attached to an affidavit of Jesse W. Curtis, Jr., in the file. It is only a copy, but I will ask you to glance [95] at it and tell us if you remember the import of that agreement? A. I do.

Q. Do you remember that the bank executed it as a part of the transaction wherein the joint adventure agreement was signed and entered into?

A. I do.

Q. In fact, it bears the same date, does it not?

A. I believe it does.

Q. When the bank executed that agreement did you do so in reliance to any extent upon the letter which is Plaintiff's Exhibit 1?

A. (No answer.)

(Testimony of Ernest McCook.)

Q. Or may I put the question the other way. When that was executed upon what did the bank rely in executing that consent and waiver?

A. We will have to go back again to the fact that we were more or less an agent of the Federal Reserve Bank.

Q. But I mean by that, did you rely upon the execution of the letter dated January 10th, signed by Mr. Morrow as president of the Morrow Aircraft Company, or did you rely upon the joint adventure agreement which was dated on the same day that this consent and waiver was executed?

A. We didn't rely particularly on the letter.

Q. As a matter of fact, when you signed that waiver [96] and consent you were relying upon the execution of the joint adventure when you released your right to foreclose, is that not true?

The Court: If you know.

The Witness: I could answer that question. several ways. I assume we were.

Q. (By Mr. Curtis): Well, the waiver and consent was executed by the bank and was to be delivered for use contemporaneously with the execution and delivery for use of the joint adventure agreement, was it not? If the joint adventure agreement was not signed the waiver and consent would not have been signed, is that right? A. That is right.

Q. And if the joint adventure agreement was signed and executed and delivered for use then the

(Testimony of Ernest McCook.)

waiver was to be executed and delivered for us, is that right? A. That is right.

Q. They are part of one deal?

A. (No answer.)

The Court: Well, Mr. McCook, there was only one \$225,000 note executed in favor of your bank, was there not?

The Witness: Yes, sir.

The Court: That was the only one that has ever been executed?

The Witness: Yes, sir. [97]

The Court: And when you talk about the Morrow Aircraft Company wasn't it the Morrow brothers or Morrow Aircraft Company and Mr. Morrow—weren't they all looked upon as one person as far your dealings were concerned?

The Witness: As in the case of the corporation; it was a corporation.

The Court: You knew it was a corporation but the Howard Morrow who is here as a defendant in this case was the one who handled most of the business?

The Witness: Until that time, yes, sir.

The Court: And you were familiar with his signature?

The Witness: I was.

The Court: And when you saw this letter, marked Plaintiff's Exhibit 1, you knew that he had signed it?

The Witness: I did.

(Testimony of Ernest McCook.)

Mr. Curtis: Your Honor, may I ask a further question?

Q. Isn't it a fact, Mr. McCook, that you dealt with Mr. Goodwin almost exclusively during the time he was manager of the Morrow Aircraft Corporation? A. That is right.

Q. How did you know what authority Mr. Goodwin had, or did you know?

Mr. Veale: That would be immaterial, your Honor.

The Court: What was the question?

Mr. Veale: "How did you know what authority Mr. Goodwin [98] had." That would be absolutely immaterial.

Mr. Curtis: Well, I will withdraw the question.

Mr. Veale: It is not contended he had any authority except that he was manager of the corporation—manager of the plant.

The Court: You are wasting a lot of time here.

Q. (By Mr. Curtis): Well, isn't it a fact, Mr. McCook, that you received a letter from Jay Taylor, who was the liaison officer between the War Department and the Federal Reserve Bank, that is, a copy of a letter which was addressed to Howard Morrow, and a copy of which has been introduced here in evidence. I think it is marked Plaintiff's Exhibit A. I show you that letter and I will also show you that it indicates that a copy was addressed to the American National Bank. That letter is dated December 2nd. Did you get a copy of that?

A. I have a copy of it, yes.

(Testimony of Ernest McCook.)

Q. Did you have an opportunity to confirm that with Colonel Taylor at any time?

A. I don't recall, unless it would have been verbally.

Q. And from the time you got that letter isn't it a fact that you dealt with Mr. Goodwin as the representative of the Morrow Aircraft Company?

Mr. Veale: We object to that again as immaterial and [99] irrelevant. It makes no difference who he dealt with.

The Court: I don't see what materiality it is. As a matter of fact, I don't think there is any dispute but what Mr. Goodwin was running the plant during the time that he was manager.

Mr. Curtis: Well, perhaps I was misled by your Honor's inquiry. I thought your Honor asked him if it wasn't a fact the he dealt with Mr. Morrow on all matters pertaining to the corporation.

The Court: Gentlemen, you must recognize that I am familiar with the general picture and know the Morrow Aircraft Company and how they were booted out of their original location and moved to Rialto. I recognize the close relationship between all the parties—many of the parties here, and I am relying a little bit on my general knowledge. I have always understood that Mr. Morrow here was the Morrow Aircraft Company, and I was surprised when I found out it was a corporation. He has been more or less the guiding light in that activity but as to what happened during this particular period I do not have any general knowledge. We

(Testimony of Ernest McCook.)

do have the testimony of Mr. Goodwin here that he did have the final say since December 2nd, I think it is.

Q. (By Mr. Curtis): Mr. McCook, the Morrow Aircraft Corporation, you say, was a customer of your bank—had business transactions as such?

A. They were.

Q. Did Howard B. Morrow as an individual have any dealings with your bank?

A. He did.

Q. In other words, he had an account in his own name? A. Yes, sir.

Q. Borrowed money from time to time in his own name? A. He did.

The Court: Counsel, my comments were without significance.

Mr. Curtiss: No further questions.

The Court: That is all.

Mr. Veale: That is all, Mr. McCook.

If the court please, there is one other matter that I think may be stipulated to and that is that the Federal Reserve—this note that has now been assigned to the Federal Reserve Bank and is in its possession——

Mr. Curtis: If you state that as a fact I will stipulate to it.

The Court: What is the stipulation?

Mr. Veale: The note in question is now the property of the Federal Reserve Bank by assignment.

The Court: There is no question but what the money has been paid to the bank by the United States of America and the United States of America is the real party in interest. [101] There is no question about that, is there?

Mr. Veale: I wanted to be certain that the assignment was in evidence by stipulation, so that the record might be complete.

The Court: Any other testimony?

Mr. Veale: That is all for the Government.

Mr. Curtis: I would like to call Mr. Morrow back to the stand for just a moment.

HOWARD B. MORROW,

called as a witness by and on behalf of the defendant, having been previously duly sworn, was recalled and testified further as follows:

The Clerk: State your full name.

The Witness: Howard B. Morrow.

Direct Examination

By Mr. Curtis:

Q. Mr. Morrow, how many stockholders were there in the Morrow Aircraft Corporation during—

The Court: What materiality is that?

Mr. Curtis: To show that there is a distinction between Mr. Morrow and the Morrow Aircraft Corporation.

The Court: I recognize that from the evidence, counsel.

Mr. Curtis: That is all. No further questions.

The Court: That is all.

Mr. Curtis: May I be sworn, your Honor, and testify as [102] to my own representation in this connection?

The Court: If you are willing to submit yourself to cross-examination.

Mr. Curtis: I will submit myself to it within the limited field of my direct examination.

The Court: All right.

JESSE W. CURTIS, JR.,

called as a witness by and on behalf of the defendant, having been first duly sworn, testified as follows:

The Clerk: State your full name.

The Witness: Jesse W. Curtis, Jr.

The Court: How old are you?

The Witness: I am 41 years of age and I don't look it, do I?

During the years 1942 and 1943 I was an attorney duly licensed to practice in the courts of the State of California and the Federal Court of this District.

During that period I was the attorney for the Morrow Aircraft Corporation. I was not at that time nor had I at any prior time represented Howard B. Morrow as an individual.

I attended a meeting in the office of the Federal Reserve Bank here in Los Angeles, the date I cannot recall, in connection with the negotiations for the joint adventure agreement. As I recall, Mr. Ambrose of the Federal Reserve [103] was there,

(Testimony of Jesse W. Curtis, Jr.)

Major Taylor. I think there were two other gentlemen who represented the War Department whose names I do not now recall; Mr. Finley, Mr. McCook, representing the American National Bank, and I think Murray Carr, who was also a member of the Fritz Ziebarth organization.

The plan as ultimately carried out was set before the group. At that time Mr. Finley stated in justification of the request that the bank withhold foreclosure upon the chattel mortgage during the period of the proposed joint adventure—I say in defense of that. He stated that, of course, the Ziebarth people were not going to take over an operation of this magnitude or the magnitude of the Morrow Aircraft Corporation without being assured that they would have the opportunity to operate without danger from the bank.

Colonel Taylor, I believe, spoke, and in reply to it stated that there would be no question but what that would be agreeable. No one else, as I recall, spoke about it or registered any objection.

That and all the other terms of the agreement were discussed and generally agreed upon, and I was delegated to prepare portions or at least a rough draft, as I recall it, of the joint adventure agreement, which I did. And there followed, I believe, one subsequent meeting at which it was—the provisions were agreed upon.

In the meantime Mr. Ball of Long Beach I think, had [104] re-drafted the agreement and I believe it was the agreement as re-drafted by Mr. Ball

(Testimony of Jesse W. Curtis, Jr.)

which was ultimately signed. You may cross-examine.

The Court: Did you in representing the Morrow Aircraft Corporation consult with Mr. Goodwin?

The Witness: Yes. Mr. Goodwin—I believe I omitted him. He was there I believe.

The Court: Did you consult with him as their attorney?

The Witness: Yes. But at the time Mr. Goodwin went in I was drawing a small retainer from the Morrow Aircraft Corporation. He discontinued that, which I could appreciate. I understood it was necessary. But the understanding was that I was to be paid for the work I did.

The Court: Did you discuss with Mr. Morrow, the defendant in this case, the proposed plan?

The Witness: I did not discuss it with him.

The Court: Did you tell him what was going on?

The Witness: I saw Mr. Morrow frequently and I have no doubt but what I told him many or possibly all of the provisions of the agreement. We had no discussion of it with that as the sole point in view.

The Court: In other words he was familiar with what was going on but your consultations with him were as president of the corporation?

The Witness: No, I would not say I had any conference [105] with him as president of the corporation. I think any conference or and discussions which

(Testimony of Jesse W. Curtis, Jr.)

I had with Mr. Morrow personally during this period were incidental. We saw each other socially.

The Court: You were trying to keep him informed as to what was happening to his plant?

The Witness: Well, I don't think that was necessary. I didn't think it was necessary because the outline of the plan in its major scope was, I believe, discussed with Mr. Morrow or told to Mr. Morrow by Mr. Goodwin. I may have reimpressed that upon him, but I didn't go into all the details of the agreement. As I say, my discussions with him were casual, incidental to other purposes for which we may have met. I saw Mr. Morrow once in a while socially and it was undoubtedly upon those occasions.

The Court: Did you consult with him professionally about this second agreement?

The Witness: No, I would say that I never had any professional discussion with Mr. Morrow about that second agreement.

The Court: So what information he got from you was casual?

The Witness: That is right.

The Court: And was there anything about this agreement relative to withholding foreclosure ever discussed with Mr. [106] Morrow by you?

The Witness: That fact was one of the incidental phases of the agreement. We placed no particular importance on it at that time.

The Court: That was a conclusion you arrived

(Testimony of Jesse W. Curtis, Jr.)

at. You know that lawyers make the poorest witnesses in the world.

The Witness: I know, and I am no exception.

The Court: So just try to answer the question. You will appreciate a little more what other witnesses go through when you and the court find fault with them. But you did discuss with him this agreement whereby the bank was to withhold foreclosure?

The Witness: If I were to answer that strictly I would have to say that I did not, no.

The Court: That is a good answer.

The Witness: I presume that is the answer you want.

The Court: That is all.

Mr. Veale: I don't think cross examination would avail anything. That is all.

The Witness: I would like to make a statement, your Honor. One of the reasons I asked this matter be re-opened, was that I had communicated with Major Taylor, who was Colonel Taylor and who is now a civilian and who has a ranch down in Amarillo, Texas. As soon as I found out where he was I called him and asked him if he would be willing to come [107] up and give his version of the story and he said he would. It was after that that this date was set. Subsequently I got a letter from him saying that the War Department had communicated with him and informed him that since he was still on a reserve status he could not appear here and testify without a clearance from them, whereupon

he wrote them and asked for a clearance which apparently he has never obtained.

I communicated with him by telephone two or three times and he had not heard. I last communicated with him last Saturday. He was in Chicago and he was just about finished there. He said that he was going on to Washington anyway and would take the matter up with the War Department and would endeavor to get a clearance there, and since business would bring him out this way, anyway, he would fly out here and be here for the trial.

He left his address in Washington. I called him Wednesday in Washington at the Mayflower and they said he had just checked out.

Now, I don't know whether he ever got the clearance and I don't know where he is, but he isn't here, and in view of the testimony which has been introduced today I doubt very much whether he would add anything more than to corroborate some of the things which have already been said with respect to Mr. Goodwin's authority. So we will rest at [108] this time with that explanation.

The Court: Gentlemen, I want to be furnished with a transcript of the first hearing, and I would like a transcript of the proceedings of today.

You must remember it has been a number of months since I have heard the first chapter of this.

In addition to that I want the case briefed. Counsel, of course, can cover whatever they desire in their briefs but I am primarily interested in how a person, when they consent as an officer of the corporation, can say that he has not consented indi-

vidually. As I remember the testimony it resolves itself down almost to that close a point.

Mr. Curtis: May we have about two minutes, your Honor?

The Court: I would prefer to have briefs. I think you might file simultaneously, simultaneous briefs with each having the right to answer, or you can file separate briefs.

I want to say that I would like to have this case finally submitted by the first of May.

Mr. Veale: I was going to suggest 10, 10 and 5, your Honor.

Mr. Curtis: That is satisfactory with me.

The Court: That is satisfactory. I think the plaintiff should make the opening brief.

Mr. Veale: I came down here this morning prepared to argue a lot of law. [109]

The Court: I am sorry to disappoint you.

Mr. Curtis: I am prepared, too, your Honor. I would like to be heard.

The Court: Well, I can read better than I can listen, gentlemen. I can come nearer following you in your brief rather than oral argument, and particularly in view of the fact that the testimony at the first hearing has become hazy in my mind.

There has been considerable briefing already and this represents a close point. If it were a simple open and shut case one way or the other I would save you gentlemen the trouble of briefing, but I do recognize there are some close legal points and I would like an opportunity to explore them fully.

Mr. Curtis: I wonder, your Honor, if it would be more convenient if we consolidated all our briefing thus far into the new brief? There have been several memorandums filed. I think your Honor has at least two from each side.

The Court: I am not going to ask counsel to do any more work than is necessary. I haven't gone over the briefs recently. I felt I would have to have a transcript of the testimony before I could study this case and I waited until this morning to hear the balance of the testimony following which I could consider the entire case along with your briefs. However, it may be that counsel in presenting the questions may [110] feel they can better present the points by re-stating what they have heretofore put in their briefs.

Mr. Veale: I believe I would prefer to do that, your Honor. I think it would be the shorter method and more convenient to your Honor in the long run.

The Court: It would be more convenient.

Mr. Veale: As it is, it is kind of piecemeal.

The Court: Yes, it is piecemeal.

Mr. Curtis: Yes, the hearings have been piecemeal and there have been delays hoping settlement could be arrived at and so forth. And there has been everything happen to delay this case.

The Court: Yes; and I am anxious to get it cleared up. If there is nothing further the case will stand submitted upon receipt of your briefs.

(Whereupon, at 12:00 o'clock noon, the above entitled matter was concluded.) [111]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of April A.D., 1947.

/s/ J. D. AMBROSE,

Official Reporter.

[Endorsed]: Filed April 28, 1948. [112]

[Endorsed]: No. 11923. United States Circuit Court of Appeals for the Ninth Circuit. Howard B. Morrow, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 6, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11923

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

HOWARD B. MORROW,
Defendant and Appellant.

STATEMENT OF POINTS AND DESIGNA-
TION UNDER RULE 19 (CCA9)
(Undocketed)

The above-named defendant and appellant, Howard B. Morrow, hereby formally adopts the Statement of Points heretofore filed in the District Court for the Southern District of California as his Statement of Points required to be filed with the clerk of the above-entitled court under Rule 19 (6).

Pursuant to Rule 19 (6) defendant and appellant presents the following Designation of Parts of the Record which he thinks necessary for consideration on appeal:

1. Complaint on Guaranty with Exhibit "I" attached thereto.
2. Motion to Dismiss for Failure to State a Claim.
3. Affidavit of Jesse W. Curtis, Jr., in support of Motion to Dismiss, with Exhibit "A" attached thereto.

4. Minute Order entered February 4, 1946, Denying Motion to Dismiss.
5. Answer with Exhibits "A" and "B" attached thereto.
6. Reporter's Transcript of Proceedings, dated January 2, 1947.
7. Stipulation for Re-opening Case.
8. Notice of Setting for Further Trial.
9. Reporter's Transcript of Further Proceedings, dated April 4, 1947.
10. Plaintiff's Exhibit 1.
11. Defendant's Exhibit "A."
12. Memorandum Opinion.
13. Findings of Fact and Conclusions of Law.
14. Judgment.
15. Notice of Appeal.
16. Affidavit, Motion and Order Extending Time to Docket.
17. Statement of Points on Appeal.
18. Designation of Record on Appeal.

CURTIS & CURTIS,

By /s/ JESSE W. CURTIS, JR.,

Attorneys for Defendant
and Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 6, 1948.

No. 11923

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for
for the Southern District of California
Central Division

APPELLANT'S OPENING BRIEF.

CURTIS & CURTIS,
207 Andreson Building, San Bernardino,
Attorneys for Appellant.

JUL 24 1948

PAUL P. O'BRIEN,

CLERK



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No. 11923

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement Showing Jurisdiction.

This is a civil action at common law wherein the United States of America is the plaintiff. It is therefore one which is properly within the original jurisdiction of the District Court. (Title 28, Chapter 2, Section 41 (1), U. S. Code.)

Statement of Case and Questions Involved.

This is an appeal by the appellant from a judgment of the District Court in favor of the appellee in the sum of \$100,000.00, together with interest and costs. The facts are as follows:

On November 13, 1942, the appellant executed and delivered to the American National Bank of San Bernardino, hereinafter referred to as "Bank," a certain guaranty by which the appellant purported to guarantee a note

in the face amount of \$225,000.00, said guaranty specifically limiting the appellant's liability thereon to \$100,000.00. [Pltf. Ex. 1, Tr. of Rec. pp. 4-7.] Although this document purported to guarantee a note of even date (Nov. 13, 1942), no note bearing such date ever came into existence. The corporation did, however, execute a note in favor of the Bank dated November 18, 1942, in the face amount of \$225,000.00, and further executed as security therefor, among other things, a chattel mortgage covering all of its furniture, fixtures, machinery, equipment, tools, tooling and accessories. [Tr. of Rec. pp. 29-37.] This loan, commonly called a Regulation V loan, was one of many made during the war. Such loans were made available to concerns manufacturing war material which was deemed by the War Department as essential to the war effort. Having certified to the necessity of such a loan, the War Department, through the Federal Reserve Bank acting as its fiscal agent, would stand ready to purchase the loan at any time upon demand of the lending bank.

Throughout the period of the loan, the War Department, the Federal Reserve Bank and the American National Bank of San Bernardino, acted more or less as one agency, and so unless the distinction becomes important, and for the purposes of our discussion here, they will be considered as one and the same.

About the time this loan was obtained, the corporation was having financial difficulties, whereupon the Bank with the consent of the officers and directors of the corporation, placed one Goodwin in charge as manager. A disagreement over policy followed, with the result that the Bank, through Goodwin, took complete control of the corporation, ousting the appellant and other officers and directors

from the corporation control. Mr. Goodwin continued to manage and control the corporation thereafter. [Tr. of Rec. p. 124; App. Ex. A, Tr. of Rec. pp. 45-46.]

On January 19, 1943, the corporation, at the instigation and direction of the Bank, formed a Joint Adventure with one Fritz Ziebarth. This Joint Adventure, although having many aspects beneficial to the corporation, was in effect a shotgun marriage, conceived, negotiated and consummated with little or no regard for the officers or directors of the corporation. It provided, among other things, that the corporation would deliver to the Joint Adventure for its use in its operation, certain of the corporation's assets, including the furniture, fixtures, machinery, equipment, tools, tooling and accessories described in the chattel mortgage. [Tr. of Rec. p. 23.] Concurrently therewith the Bank executed an instrument known as Consent, Waiver and Agreement of Indemnity, which provided among other things, that the Bank would not foreclose the Chattel Mortgage upon the furniture, fixtures, machinery, equipment, tools, tooling and accessories during the existence of the Joint Adventure. [Tr. of Rec. pp. 37-40.]

On November 29, 1944, the promissory note, with its accompanying security and guaranty, was assigned by the Bank to the appellee. On May 4, 1945, the note being unpaid, appellee filed this action upon the guaranty against the appellant. On January 11, 1946, the appellant filed a Motion to Dismiss the Complaint for Failure to State a Claim [Tr. of Rec. p. 7], urging that the action was prematurely brought inasmuch as the Joint Adventure was still in full force and effect at the time the action was commenced and also at the time the Motion to Dismiss was filed, and that the Bank had agreed not to foreclose during the existence of the Joint Adventure. However,

the trial court denied the Motion to Dismiss and allowed the appellant to answer. [Tr. of Rec. p. 24.]

Thereafter the appellant filed his answer denying that any cause of action against him existed upon the alleged guaranty and further alleged that he was exonerated from any such liability by reason of the alteration and extension of the note and chattel mortgage without his knowledge or consent. [Tr. of Rec. pp. 28-29.] After a trial of the issues, the court rendered a judgment in favor of the appellee and against the appellant for \$100,000.00, together with interest and costs as therein set forth. From this judgment the appellant has appealed.

The questions involved in this appeal are as follows:

1. Can an action on a guaranty of a primary obligation be maintained during a period within which the right to foreclose a chattel mortgage securing the primary obligation has been suspended? This question was raised by appellant's Motion to Dismiss.

2. Does the complaint state a cause of action upon a guaranty where it appears on the face thereof that the note alleged to be the primary indebtedness differs in a material respect from the note described in the body of the guaranty? This question was raised by appellant's answer.

3. Does the complaint state a cause of action upon the guaranty where it appears that at the time of its execution no primary obligation existed? This question was raised by appellant's answer.

4. Was the conduct of the appellant such as to raise, as a matter of law, an implication of consent to the material alteration of the primary obligation? This question was raised by paragraph I of the Conclusions of Law herein.

Specification of Errors Relied Upon.

Defendant contends that the District Court erred in the following respects:

1. In denying appellant's Motion to Dismiss the Complaint for Failure to State a Claim.
2. In concluding, as a matter of law, that the appellant consented to the material alteration and extension of the primary obligation.
3. In giving judgment for the appellee upon a complaint which does not state a cause of action.

Summary of Argument.

The following is a summary of appellant's position and the points which we are urging in this argument:

1. At the time this suit was commenced, no cause of action existed against the appellant.
2. It appears from the face of the complaint that the note alleged therein to be the primary indebtedness differs in material respects from the note described in the body of the guaranty.
3. It appears on the face of the complaint that at the time the guaranty was executed, there was no primary indebtedness in existence.
4. Appellant guarantor was exonerated by reason of a material alteration in the primary obligation without his consent.
5. Appellant's knowledge of alteration does not prevent exoneration.
6. Consent to a material alteration will only be implied from conduct amounting to an estoppel.
7. There is no evidence of conduct on the part of the appellant from which the court can properly imply consent.

ARGUMENT.

I.

At the Time Suit Was Commenced, No Cause of Action Existed Against the Appellant.

There can be no question but that the right to foreclose the chattel mortgage was suspended during the existence of the Joint Adventure as the Consent, Waiver and Agreement of Indemnity specifically so states. [Tr. of Rec. pp. 37-38.] The Joint Adventure Agreement was still in existence at the time of the filing of the action, and this fact was called to the attention of the trial court by the affidavit of Jesse W. Curtis, Jr., filed with the Motion to Dismiss. [Tr. of Rec. pp. 8-10.] The Joint Venture Agreement did not terminate until January 19, 1946. [Tr. of Rec. p. 117.]

It is fundamental that if, for any reason, the debtor is not bound to make payment to the creditor, the latter may not hold the guarantor liable and that, in order to establish a cause of action against a guarantor, the creditor must show that the debtor is liable on the principal obligation.

Kilbride v. Moss, 113 Cal. 432, 45 Pac. 812.

It is true that the guarantor waived his right to require the Bank to proceed against or exhaust any security held by it [Tr. of Rec. p. 5], but this did not result in a waiver of the defense here made. An analogous situation is presented in *Rhodes v. Andrews*, 313 Ill. App. 428, 40 N. E. (2d) 537. There the transferee of the payee sued the guarantor on the note after default. The defense was that suit was premature because, subsequent to default, the principal obligor had procured a confirmation of a

plan for reorganization under Section 77b of the Bankruptcy Act, which extended the time for payment of the note, to which reorganization extension the original payee *and the guarantor consented*. The court held that the bankruptcy proceeding and the consequent extension had the effect of suspending the payee's remedy on the note not only against the principal obligor *but also against the guarantor*.

It is respectfully submitted that the District Court erred in denying appellant's motion to dismiss after it had been called to the court's attention that the Bank's remedy against the original obligor was suspended at the time of the filing of the action.

II.

It Appears on the Face of the Complaint That the Note Alleged Therein to Be the Primary Indebtedness Differs in Material Respects From the Note Described in the Body of the Guaranty.

The complaint alleges [Tr. of Rec. p. 3] a guaranty executed by the defendant, dated *November 13, 1942*, whereby appellant guaranteed payment of the corporation note referred to in said contract of guaranty as a note of "even date herewith." [Tr. of Rec. p. 5.] The complaint further alleges [Tr. of Rec. p. 2] that the note underlying the purported contract of guaranty is in fact dated *November 18, 1942*. There is no allegation that the note and guaranty are a part of one transaction, and obviously there is a fatal variance between the note to which the guaranty refers and the note which the complaint alleges to be the underlying obligation.

To properly maintain this action, the assistance of a court of equity is necessary in order to determine whether

the guaranty or the note correctly describes the primary indebtedness. In a court of equity the appellant would have had an opportunity to assert any equitable defenses available to him. Although this contention was not set forth as a ground for the Motion to Dismiss, the contention was made orally and it was repeated at the commencement of the trial. [Tr. of Rec. pp. 70-71.] We submit that the District Court should have granted appellant's Motion to Dismiss and, in any event, the complaint does not state a cause of action and will not support a judgment thereon in favor of the appellee.

III.

It Appears on the Face of the Complaint That at the Time the Guaranty Was Executed, There Was No Primary Indebtedness in Existence.

It is fundamental that a guaranty cannot exist without a primary obligation to which it is collateral. A primary obligation must be shown to exist before there can be any cause of action against an alleged guarantor.

Yangtsze Rapid S. S. Co. v. Deutsh-Asiatic Bank
(C. C. A. 9th), 59 F. (2d) 8, 12;

Kilbride v. Moss, 113 Cal. 432 (45 Pac. 812);

Glassell v. Coleman, 94 Cal. 260 (29 Pac. 508);

Ingalls v. Bell, 43 Cal. App. (2d) 356 (110 P. (2d) 1068);

City Nat'l Bank v. Lemco Mfg. Co., 57 Cal. App. 566 (207 Pac. 509).

In the language of the last cited case at page 567:

“The obligation of the guarantor being accessory to that of the principal obligor, it would seem to be as self-evident in law that if there is no principal there can be no accessory, as in physics it is self-evident that there can be no shadow where there is no substance.”

Brandt on Suretyship and Guaranty, 3rd Ed.,
Secs. 4, 19, 163, and notes.

Although the complaint alleges a “continuing guaranty,” reference to the guaranty will show beyond question that the guaranty is not a “continuing” one, but simply a guaranty relating to a certain promissory note “of even date” therewith.

It is true that it was stipulated at the trial on the merits of the action that the note and guaranty were executed as a part of one transaction. [Tr. of Rec. p. 72.] It is also true that the District Court found as a Conclusion of Law that the note and guaranty were a part of one transaction. However, it is the contention of the defendant that *as a matter of pleading*, the complaint failed to state a cause of action because of the variance.

The denial of the motion was an error and the District Court did not have jurisdiction in this case to render judgment in favor of the appellee.

IV.

Appellant Guarantor Was Exonerated by Reason of a Material Alteration in the Primary Obligation Without His Consent.

Section 2819 of the Civil Code of California provides:

“A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto, in any way impaired or suspended.”

Section 2787 of the Civil Code of California abolishes the distinction between sureties and guarantors.

An agreement not to foreclose a mortgage for a certain period of time is both a material alteration and an impairment and suspension of remedies or rights of the creditors sufficient to release a guarantor unless the guarantor consents.

Braun v. Crew, 183 Cal. 728 (192 Pac. 531);

Tuohy v. Woods, 122 Cal. 665 (55 Pac. 683);

Miller v. Roach, 15 Cal. App. (2d) 427 (59 P. (2d) 418).

By expressed provision in the Consent, Waiver and Agreement of Indemnity, the Bank agreed not to foreclose or to enforce any lien or claim on or upon any of the said tools, fixtures, equipment, patents, or patent rights, or interfere with the possession or use of the said equipment during the existence of the said chattel mortgage. . . .”
[Tr. of Rec. pp. 37-38.]

In view of the foregoing, there can be no question but what the appellant as guarantor was exonerated unless he consented to the suspension of remedies as hereinabove set forth.

V.

Appellant's Knowledge of Alteration Does Not Prevent Exoneration.

Mere knowledge of acts done by the creditor without objection on the part of the surety does not constitute consent and, as a general rule, some affirmative action is necessary.

Pac. Nat. Agri. Credit Corp. v. Hagerman, 39 N. M. 549, 51 P. (2d) 857;

City of Middletown v. Aetna Indemnity Co., 97 App. Div. 344, 90 N. Y. Supp. 16, 17;

Lambert v. Shetler, 71 Iowa 463, 32 N. W. 424;

Thompson v. Metropolitan Bldg. Co., 95 Wash. 546, 164 Pac. 222;

A. B. Klise Lumber Co. v. Enkima, 146 Minn. 5, 181 N. W. 201;

Union Indemnity Co. v. Benton County Lumber Co., 179 Ark. 752, 18 S. W. (2d) 327 at 330;

American Iron & Steel Mfg. Co. v. Beal, 50 C. J. 114;

See 101 *A. L. R.* 1310 for a collection of cases supporting the following statement:

“The rule that a surety or endorser, who merely remains silent on learning of facts which are grounds for his discharge from liability, may thereafter assert his claim for relief by reason of such facts, appears to be established by a majority of the cases upon that point.”

In the case of *Pac. Nat. Agri. Credit Corp. v. Hagerman*, 39 N. M. 549, 51 P. (2d) 857, 101 A. L. R. 1301, the court says:

“One of the main arguments urged upon us by appellee’s able counsel is that by remaining silent and passive after learning of the deduction with knowledge that the creditor was continuing its advances on the face of his endorsement, and by failing to notify it that he claimed a discharge and would refuse to be bound, the appellant acquiesced in the deductions, and cannot now be heard to question it.

“But was it appellant’s duty to speak? If not, then he may still be heard to complain on this breach of the conditions under which he became an endorser.

“Mr. Brandt, in his work on Suretyship & Guaranty (3rd ed.), Section 279, says: ‘If the surety knows of the extension at the time it is given, it is not necessary that he should object thereto in order to entitle him to his discharge. It is not enough to bind him, that he is informed and is passive. He is not required to object or protest. He must actively concur and consent to be bound by the terms of the new agreement.’

“The author of the text on Principal and Surety, in *Corpus Juris*, states the rule at 50 C. J. 113, 114, Section 192, as follows: ‘Consent may be implied from the conduct of the surety, such as advice or a request to perform the acts relied on as a discharge, or from a course of business or usage known to the surety. Where consent is to be implied, the facts from which it is to be implied, must very clearly warrant the implication. Mere knowledge of the acts done by the creditor or obligee subsequent to the making of the contract of suretyship without objec-

tion on the part of the surety, is not consent by the latter for, as a general rule, some affirmative action is necessary.' .

"In *City of Middletown v. Aetna Indemnity Co.*, 97 App. Div. 344, 90 N. Y. S. 16, 17, the court said: 'No duty devolved upon the appellant to speak when it learned of the deviations that had been made from the contract which it had guaranteed. Its release had already been effectuated and no authority is presented to us to show that after the release was complete, it devolved upon the appellant to comment either one way or the other upon the situation.

" 'It is undoubtedly true, we think, that if an extension of time is granted the principal, the surety is discharged unless he consents thereto. Mere knowledge of such extension without more, is immaterial. *Lambert v. Shetler*, 71 Iowa 463, 32 N. W. 424.

" 'It is not necessary to the discharge of a surety on account of indulgence given by the creditor to the principal, that the surety should show notice to the creditor of his dissent to the indulgence. The act of the creditor discharges the surety without any act of dissent on the part of the surety. The surety stands upon his legal right and the creditor must look to his own acts and their legal consequences.' "

It may be admitted that appellant, Howard B. Morrow, had knowledge of the contents of the Consent, Waiver and Agreement of Indemnity, albeit second-hand knowledge—information which he picked up through incidental conversations and ultimately through the context of Appellee's Exhibit 1, but the rule laid down by the foregoing cases establish beyond doubt the rule that knowledge on the part of the guarantor of itself does not prevent him from standing upon his right to exoneration.

In the instant case there was no further extension of credit or other benefits by the Bank to the corporation in reliance upon the guaranty. There is no conduct of any kind appearing in the evidence which would support a finding of waiver on the part of the guarantor. Mere knowledge of acts done by the creditor without obligation on the part of the surety does not constitute consent, for as a general rule some affirmative action is necessary. This rule is subject to certain exceptions such as appear in *Union Oil Company v. Mercantile Refining Co.*, 8 Cal. App. 768, 97 Pac. 919, and *Christie v. Commercial Casualty Insurance Co.*, 6 Cal. App. (2d) 710, 45 P. (2d) 263, but there are no facts in the instant case which would justify applying either one of these cases to our problem.

VI.

Consent to a Material Alteration Will Only Be Implied From Conduct Amounting to an Estoppel.

Where consent is to be implied, the facts from which it is to be implied must clearly warrant the implication.

50 Corpus Juris 114.

There are many cases in which the court has implied consent on the part of the guarantor, and many cases where the court has refused to imply consent. and although the reasoning in these cases is often vague and the language inconsistent, we think that they can all be reconciled by applying the doctrine of estoppel. We think the true rule is that when the conduct of a guarantor is of such a nature as will, under the circumstances in the particular case, estop him from denying his liability as a guarantor, then and only then, the court is justified in

finding an implied consent. The following are typical examples of the application of the rule:

In the case of *Andrews v. Austin*, 213 Iowa 963, 232 N. W. 79, the defendant guarantors were president and cashier respectively of the creditor bank. Subsequent to the execution of the guaranty, the obligations were extended from time to time by the creditor bank acting through the defendant president and cashier, who personally handled and negotiated the extensions. It was held that the defense of alteration was not available to either of the defendants for they were "conclusively charged with notice of the alteration and of their assent thereto." Although the language of the case is rather vague, it is obvious that the guarantors, being officers of the bank, and therefore occupying a fiduciary relationship with the creditor, had a duty to the bank arising from their employment, which duty was to protect the bank against the release of guarantors. Having this duty to the bank, their conduct was such as would estop them from asserting alteration as a defense to an action upon the guaranty. Any other result would have been inequitable.

In *Hallock v. Yankey*, 102 Wis. 41, 78 N. W. 156, Yankey, the treasurer of a manufacturing company, and Hertzheim, a stockholder therein, both guaranteed a loan from a bank to the manufacturing company. Yankey, in his capacity as treasurer, requested, negotiated and induced several extensions. Hertzheim was present on the first one of these occasions, but not the others. The court held that Yankey, by reason of his inducement and his affirmative action, even though done as treasurer of the corporation, consented to the extensions and modifications and therefore was liable on the guaranty, whereas Hertzheim was exonerated.

It would seem clear that the guarantor, Yakey, by reason of his conduct, would be estopped to assert an alteration as a defense from his guarantee under the doctrine of estoppel, for by taking the affirmative action of appearing and requesting and urging an extension, he was representing to the bank a willingness on his part as an individual guarantor that the extension be granted. The bank relied upon such a representation, which was a reasonable consequence of his conduct. Had the defense been available to Yankey, the bank would have sustained a loss. We have here a very typical example of the application of the doctrine of estoppel. On the other hand, Hertzheim's conduct was held to be insufficient for it was not such a representation of willingness as the bank would be justified in relying upon.

In the case of *Mundy v. Stevens*, 61 Fed. 77, the defendant guaranteed an obligation of his son. He later signed a modification agreement as the attorney-in-fact for his son. It was held that his act was sufficient to constitute consent. This is an old case and the facts are very briefly stated. In this case the guarantor's signature appeared on the modification agreement although it appeared as attorney-in-fact as the debtor. We think it is reasonable to assume that the guarantor requested the extension. In any event, there was a representation of willingness on the part of the guarantor. The creditor's reliance upon such representation was a reasonable consequence of the conduct of the guarantor. The application of the doctrine of estoppel to the case would support the finding of the court.

The foregoing are typical of those cases in which the court has implied consent. The following are typical of the cases in which the court has refused to imply consent:

Security State Bank v. Gray, 224 Mo. App. Rep. 980, 25 S. W. (2d) 512: Gray guaranteed the obligation of K Company to Security National Bank. Security National Bank subsequently dissolved. A new corporation called Security State Bank was formed, taking over all the assets of the former bank and the stockholders in the new bank were identical with the stockholders in the old bank. Gray, the guarantor, was a stockholder in both the old bank and the new, and he voted his stock in favor of the dissolution of the first bank, the formation of the second bank, and the transfer of the assets, and all other matters relating to the change-over. Held that guaranty was released by renewals and extensions made by the new bank, and that the guarantor, notwithstanding his active participation in the change-over which brought about the release, was released for there was no conduct sufficient to give rise to the implication of consent.

This case differs from the case of *Andrews v. Austin*, *supra*, in that Gray, not being an officer, had no obligation to look out for the interests of the bank. Furthermore, there is no showing of any reliance on the part of the bank upon Gray's activity sufficient to invoke the doctrine of estoppel.

In the case of *Springer Lith. Company v. Graves*, 97 Iowa 39, 66 N. W. 66, it was held that writing a letter by the guarantor to the creditor after the maturity of the debt, requesting that the creditor give the debtor "a reasonable chance" to pay and to give him "time and opportunity to pay" was not a waiver or a consent to an extension.

Apparently the court felt that here the conduct of the guarantor did not amount to an estoppel or that the creditor did not or was not entitled to rely upon any conduct

of the surety which might have appeared as favoring such extension. In any event, this is a good example of the strictness with which the law regards the obligation of the guarantor. Such obligation must be strictly construed. In order to preserve this strict construction, the court will strictly construe in favor of such guarantor any document which purports to contain a consent to a modification.

We again assert that the true rule is as above stated. Consent will be implied only where there is affirmative conduct on the part of the guarantor which is of such a nature, and occurs under such circumstances, as will amount to an estoppel to deny liability as a guarantor.

VII.

There Is No Evidence of Conduct on the Part of Appellant From Which the Court Can Properly Imply Consent.

Appellee throughout the trial has relied upon Appellee's Exhibit 1 [Tr. of Rec. pp. 43-44], which consists of a letter from Morrow Aircraft Corporation to the Bank as the only act from which the consent of the guarantor might be implied.

In order to place a proper value upon the letter, one must understand the circumstances preceding the signing of the letter. As we have already pointed out, some time prior to the execution of the letter, the appellant, the other officers and the members of the Board of Directors of the Morrow Aircraft Corporation, had disagreed with Goodwin, the agent of the Bank, all of which had resulted in Mr. Goodwin being given complete control of the affairs of the corporation to the exclusion of the officers and directors. This had to do not only with production, but

it went far beyond that, for it was he, in collaboration with the representatives of the Federal Reserve and the War Department, who instigated and carried on the negotiations for the Joint Adventure with Fritz Ziebarth. In this regard, the officers of the corporation were completely ignored. It was not thought that their presence was either necessary or proper at such negotiations. In all probability, this was not done by design, but the relationships of Mr. Goodwin to the corporation were such that it did not occur to anyone that the officers or the directors of the corporation had any place in such negotiations.

Mr. Morrow found out about them casually and through indirect means. It would have been of little use for him to protest or object, as the Bank held substantially all of his stock in the corporation on a pledge, and with little difficulty could have called the loan, foreclosed the pledge and exercised actual voting control over the corporation. Furthermore, at that time we were absorbed in the exigencies of fighting a war where the personal rights of individuals were readily sacrificed less a person be considered as impeding the war effort. And so Mr. Morrow cooperated with Mr. Goodwin to the extent of standing by and doing such formal things as a president of a corporation might be required to do to carry out the bank's program but without any power of decision or other authority.

With things in this condition, the Bank, out of its own knowledge of the negotiations and proposed agreement with Fritz Ziebarth, prepared the letter in question for the

signature of some responsible officer of the Morrow Aircraft Corporation. Mr. Morrow was asked to sign it. Mr. Morrow read it over and signed it as President of the Morrow Aircraft Corporation.

Assuming the letter to be a consent on the part of the corporation, we submit that, particularly under the circumstances related, Mr. Morrow's act of signing the letter as president of the corporation is not such conduct as the bank was justified in relying upon as the consent of the guarantor. In fact there was no reliance placed upon it by the bank. [Tr. of Rec. p. 152.]

This is not the case of the corporation president and guarantor who goes to the bank and pleads for an extension such as was true in the case of *Andrews v. Austin, supra*.

This is not the case of a treasurer of a corporation who is also a guarantor, requesting, negotiating and inducing extensions of the primary indebtedness, such as was true in the case of *Hallock v. Yankey, supra*.

This is not even the case of a guarantor writing the creditor requesting that the debtor be given a "reasonable chance," "time and an opportunity to pay," as occurred in the case of *Springer Lith. Company v. Graves, supra*, in which the court held even here that there was no waiver and no consent implied.

To imply a consent in a situation such as we have in this case, would be going far beyond any case we have been able to find. But this letter does not purport to be a con-

sent, waiver or approval of the terms and conditions herein set forth, nor was it a request, even on behalf of the corporation. Its only effect is an admission on the part of the corporation, and possibly Howard B. Morrow, of full knowledge that the Bank was being required to make the commitment therein stated. To give the letter any meaning beyond merely an admission of knowledge, would be to read into it something which it does not contain. This particular letter was prepared by the Bank, upon its own instigation [Tr. of Rec. p. 141], and any ambiguities or uncertainties therein must be interpreted most strongly against the Bank.

Civil Code, Sec. 1654;

4 *Cal. Jur. Ten-Year Supp.*, p. 135.

Then to apply the doctrine of estoppel to the circumstances here, it most certainly cannot be said that the Bank was ignorant, actually or presumably, of the truth, for it, in this particular case, not only knew all the facts, but had a greater knowledge of the entire transaction than did the appellant. Furthermore, there was no intention on the part of the appellant Morrow, either expressed or implied, that any reliance whatever should be placed upon the letter, nor did the Bank rely upon any silence or acquiescence or misrepresentation on the part of the appellant. Whatever the purpose of the letter may have been, it has no legal implication as a consent, approval, request, waiver, or otherwise than as an admission of knowledge of the facts therein contained.

Summary.

In conclusion, we respectfully submit that the complaint does not state a cause of action, and that it is defective in at least three respects. In the first place, at the time the complaint was filed, no cause of action existed against the appellant for the rights against the primary debtor were then suspended. Secondly, it appears on the face of the complaint that the note alleged to be the primary indebtedness differs in a material respect from the note described in the guaranty. And thirdly, it appears that there was no primary indebtedness in existence at the time the guaranty was executed.

We have next contended that if the guarantor was ever liable upon the guaranty, he was exonerated by a material alteration of the primary indebtedness to which there was no consent. Although the appellee has contended that the material alteration was consented to, it has failed completely to show actual consent and has relied entirely upon the letter marked Plaintiff's Exhibit 1, as conduct from which a court may imply consent.

We have further contended that the conduct of the appellant in executing the letter aforementioned is not such as will support a finding of the trial court of consent.

We submit further that the trial court erred in rendering a judgment in favor of the appellee and that this action should have been dismissed.

Respectfully submitted,

CURTIS & CURTIS,

Attorneys for Appellant.

No. 11923

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE, UNITED STATES OF AMERICA.

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FILED

AUG 21 1948

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HOWARD B. MORROW,

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REPLY BRIEF OF APPELLEE, UNITED STATES OF AMERICA.

Jurisdictional Statement.

The United States sued the appellant Howard B. Morrow on a guaranty in the District Court of the United States for the Southern District of California, pursuant to Judicial Code, Sec. 24, as amended, *28 U. S. Code, Sec. 41, Subdivision (1)*. [R. pp. 2-7.] From a judgment for the plaintiff [R. p. 58], defendant Morrow appeals to this Court, pursuant to Judicial Code, Sec. 128, as amended, *28 U. S. Code 225(a)-First*. [R. pp. 59, 63, 166.] Jurisdiction below and here is based on said sections.

Statement of the Case.

The United States, through the Federal Reserve Bank, is the owner and holder, by transfer, of a promissory note for \$225,000 made by Morrow Aircraft Corporation, dated November 18, 1942. and payable on demand on or before November 15, 1943, to the order of American National Bank of San Bernardino, California. [R. pp. 30-31, 69-75, 156-157.]

The \$225,000 note is secured in full by a chattel mortgage, also dated November 18, 1943, covering personal property of the Company [R. pp. 29-37, 134]; and, to the extent of \$100,000, is also secured by a guaranty executed by Howard B. Morrow, dated November 13, 1942. [Exhibit I to the Complaint, R. pp. 4-7, 121.]

In November, 1942, Howard B. Morrow, the appellant guarantor, was the president and the majority stockholder of Morrow Aircraft Corporation, and apparently remains so to date. [R. pp. 88, 112.]

The \$225,000 note, the chattel mortgage and Morrow's guaranty were all executed as a part of one transaction, the purpose and effect of which was to retire a \$100,000 company note then held by said American National Bank, and to secure \$125,000 additional money with which to engage in the manufacture of certain war merchandise, under contracts with the War Department of the United States. [R. pp. 71-74, 90, 104, 153.]

The \$225,000 loan was made as a "Regulation B" loan, *i. e.*, guaranteed in part by the United States, through its War Department. [R. pp. 76, 81-82.]

The Company had previously been manufacturing war material for the War Department, and wished to continue

and increase its production. [R. pp. 76, 78-80.] The financial re-arrangement of November 18, 1942, between the Bank, Howard B. Morrow and Morrow Aircraft Corporation was the result.

The next day, on November 19, 1942, on recommendation of an Army liaison officer, of the Fiscal Division, stationed at the Federal Reserve Bank in Los Angeles, Morrow Aircraft Corporation employed and installed Guy Goodwin as general manager of its plant. [R. p. 123.]

In December, 1942, disagreements over plant operating policies arose between Howard B. Morrow, as president, and Mr. Goodwin, as general manager [R. pp. 124, 45-46, 135-136]; and shortly afterward, to wit, on January 19, 1943, Morrow Aircraft Corporation entered into a Joint Adventure Agreement [R. pp. 10-23] with Fritz Ziebarth (who had been working with the company previously), under which the said Joint Adventure, with Ziebarth in active charge supplanting Goodwin, took over most or all of the operations at the Morrow Aircraft Corporation plant, the Company thereafter relying on its share of profits from the Joint Adventure as its chief source of income, rather than from its operation of the plant.

One of Ziebarth's preliminary requirements before entering into this Joint Adventure with Morrow Aircraft Corporation was that the Company would secure from the American National Bank its consent that the Joint Adventure might have the use of all the tools, fixtures, equipment, patents and patent rights of the Company, and that the Bank would not foreclose or enforce any lien thereon, under the chattel mortgage, during the Joint Adventure, "except with the consent of Ziebarth." [R. pp. 88-90.]

On January 10, 1943, Howard B. Morrow as president of the Company, requested the Bank to enter into such an agreement [see Plaintiff's Exhibit No. 1, R. pp. 43-44, 87-90, 100-102, 119, 130, 153-154]; and pursuant to his said request, the Bank on January 19, 1943 gave the consent he asked [R. pp. 37-41]; and among other things, it agreed as follows:

“In consideration of the terms and conditions of that certain Joint-Adventure Agreement, entered into as of the 19th day of January, 1943, between Fritz Ziebarth, herein referred to as Ziebarth, an individual, of Reno, Nevada, and The Morrow Aircraft Corporation, a California corporation, of Rialto, California, hereinafter referred to as Morrow, and the execution and delivery of a certain assignment by Morrow, contemporaneously herewith, the undersigned, the American National Bank of San Bernardino, hereinafter referred to as the Bank, hereby consents to the use of the various equipment, tools, facilities, fixtures, patents, and patent rights, now in the possession of Morrow or under its control, by the Joint-Adventure, as provided in said Joint-Adventure Agreement, and further, agrees *not to foreclose, or enforce any lien or claim, on, or upon, any of said tools, fixtures, equipment, patents, or patent rights,* or otherwise interfere with the possession or use of said equipment *during the existence of said Joint-Adventure, except by the written consent of Ziebarth.*” [R. pp. 37-38.]

Ziebarth agreed with Morrow Aircraft Corporation, in their Joint Adventure Agreement, “to advance all necessary operating capital, to run and operate the equipment and facilities” and to complete the Company's contracts for war material then agreed upon between them, or thereafter expressly approved by him. [R. pp. 10-23, 15.]

The Joint Adventure became effective January 19, 1943, and terminated January 19, 1946. [R. pp. 110, 117.]

The \$225,000 promissory note of the Company was not paid when due on November 15, 1943, and on November 29, 1944, the Bank assigned and delivered the note and guaranty to the United States of America (Federal Reserve Bank). [R. pp. 156-157, 54.]

There was a default of in excess of \$100,000 on the note, and on May 4, 1945, the United States sued Howard B. Morrow on his guaranty, asking judgment against him in the sum of \$100,000, with interest at the rate of 6% thereon from November 13, 1944. [R. pp. 2-4.]

On January 11, 1946, defendant Morrow filed a motion to dismiss the Complaint on the ground that "the primary obligation upon which it is based is not due and payable" since the Joint Adventure Agreement was then "still in effect," and the American National Bank of San Bernardino (plaintiff's assignor) had agreed "not to foreclose or enforce any lien or claim upon any of the tools, fixtures, equipment, patents or patent rights," *i. e.*, the chattel mortgage "except by written consent of Ziebarth," during the existence of the Joint Adventure. [R. pp. 7, 9-10, 37-38.] This presented a question of prematurity of suit.

The motion to dismiss was heard and overruled by the District Court on February 4, 1946, two weeks after the termination of the Joint Adventure Agreement. [R. pp. 24, 117.]

On March 13, 1946, defendant Howard B. Morrow answered the complaint raising three defense contentions, to wit:

1. *Prematurity of Suit*—That when the complaint was filed "no cause of action existed on the said

promissory note as against Morrow Aircraft Corporation" because the American National Bank's "Consent, Waiver and Agreement of Indemnity" provided that said Bank would not foreclose the chattel mortgage securing it during the joint adventure, except with Ziebarth's consent. [R. p. 28.]

2. *Exoneration of Guarantor by "Extension of Time"*—That by making such an agreement the Bank had "materially altered and extended the due date of the promissory note . . . without the knowledge or consent of the defendant (Howard B. Morrow)," thereby exonerating him as guarantor. [R. pp. 28-29.]

3. *Error in Description of Note Guaranteed*—A third defense, injected into the Answer through general denials, was that the guaranty was always ineffective because, being dated November 13, 1942, it erroneously described the primary obligation thereby secured as "that certain *indebtedness* of Morrow Aircraft Corporation to the (American National) Bank, *evidenced by a promissory note of even date herewith, in the face amount of \$225,000,*" whereas the \$225,000 note actually intended bears date November 18, 1942, five days later. [R. pp. 4-5, 30-31; and Par. III, IV, R. pp. 25-26.]

At the opening of the trial on January 2, 1947, Morrow's attorney agreed in effect, that since the Joint Adventure had been terminated a year earlier, on January 19, 1946, the defense of prematurity of suit was no longer effective [R. p. 70]; and the parties stipulated that the \$225,000 note and guaranty, although dated differently, were executed as a part of one and the same transaction.

[R. pp. 71-74, 104, 153.] Only one \$225,000 note was ever executed [R. pp. 89-90]; and it was proved at the trial that the Federal Reserve Bank insisted, at the time of the negotiations for the \$225,000 loan, that Howard B. Morrow, who had been a guarantor on the preceding \$100,000 obligation, must personally guarantee \$100,000 of the increased loan, which *he testified he understood he was doing* in signing the guaranty. [R. pp. 79-80, 89-90.]

The parties also stipulated to nearly all the other facts outlined above [R. pp. 68-75, 156-157], and this left merely one issue of fact, to wit:

Whether Howard B. Morrow "consented" to the American National Bank's "Consent, etc.," which "Consent, etc." he claimed constituted an "extension of time" for payment of its note by Morrow Aircraft Corporation, and an exoneration of his guaranty, under *California Civil Code*, Sec. 2819, which provides:

"A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

Morrow testified that he never objected to the Bank's "Consent, etc." before the suit was filed [R. pp. 105-106], nor demanded foreclosure of the chattel mortgage under *California Civil Code*, Sec. 2845, which provided:

"A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue,

and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is *exonerated to the extent to which he is thereby prejudiced.*”

Proportionate exoneration under Sec. 2845, supra, for alleged neglect to foreclose the mortgage was never claimed by Morrow, and in view of his guaranty obviously could not have been. *Full exoneration under Sec. 2819, supra*, for alleged alteration of the “*original obligation of the principal*” or for alleged impairment or suspension of “the remedies or rights of the creditor against the principal *with respect thereto,*” *without his consent*, has always been his asserted defense.

The District Court found as a fact, on overwhelming proof [R. pp. 87-90, 100-106, 119, 130, 153-154], that appellant Morrow *did consent* to the Bank’s “Consent, etc.,” and the Court also held that the variance in date between the note and the description thereof in the guaranty was *immaterial* under the proof; and hence that *neither exonerated Morrow* on his guaranty. [Memorandum Opinion, R. pp. 46-52; Findings of Fact and Conclusions of Law, R. pp. 53-57.]

Accordingly, on June 3, 1947, the District Court entered its judgment in favor of the United States against Howard B. Morrow, as guarantor, for \$100,000, plus interest thereon at the rate of 6% per annum from May 4, 1945 (the date this suit was filed), plus \$29.23 court costs. [R. pp. 7, 58-59.]

Morrow filed his notice of appeal from the judgment on August 29, 1947 [R. p. 59], and after some extensions of time for filing and docketing the appeal [R. pp. 60-63], the appeal was duly perfected.

Questions Involved on Appeal.

The questions involved here are:

Whether the suit was prematurely filed, and if so, whether the question of prematurity is moot; and whether Morrow's guaranty was exonerated or discharged (a) by the flaw in the description of the note's date in the guaranty [R. pp. 4-5, 30-31], or (b) by the Bank's "Consent, etc." [R. pp. 37-41.]

(The Appellant's claim of exoneration through the Bank's "Consent, etc." is invalid under *California Civil Code*, Sec. 2819: (a) if he *consented* thereto, as the District Court found as a fact he did [R. pp. 46-57]; or (b) if it did not constitute a material alteration, impairment or suspension of the "original obligation" (note) of Morrow Aircraft Corporation, as Appellee contends it did not. As the overwhelming proof sustains the judgment below, in any event, our second point that Morrow's consent to the Bank's "Consent, etc." was actually unnecessary, is cumulative, and probably superfluous.)

ARGUMENT.

Summary.

The judgment below should be affirmed because:

1. The suit was never premature; and the question of prematurity is moot.

2. The flaw in the description of the note's date in the guaranty is immaterial; and did not render the complaint insufficient.

3. Morrow consented in advance, in the guaranty, and also in his letter at the time of the formation of the joint adventure, to the temporary waiver of foreclosure under the chattel mortgage involved in the Bank's "Consent, etc.," as the District Court properly found; although want of such consent would not have exonerated the guaranty.

4. The District Court's Opinion and Findings of Fact and Conclusion of Law are supported by the proof, and the judgment should be affirmed.

I.

The Suit Was Not Premature; and the Question of Prematurity Is Moot.

1. The defense of prematurity is based on the erroneous theory that the Bank's "Consent, etc." *extended the time for payment of the Company's note, which it did not* The Bank's "Consent, etc." was merely a temporary waiver of a right to subject one of two securities, in case of default. It had no effect whatever on the note, or its due date, November 15, 1943; and this suit, filed on the guaranty on May 4, 1945, was never premature.

[Compare the note, R. pp. 30-31; the chattel mortgage, R. pp. 29-37; the Bank's "Consent, etc.," R. pp. 37-41; the Joint Adventure Agreement, R. pp. 10-23; and the date suit was filed, R. p. 7.]

2. Also, the guaranty (which designated Howard B. Morrow, as "the Guarantors," the Morrow Aircraft Corporation as "the Borrower," and the American National Bank as "the Bank") provided among other things as follows [R. pp. 4-5]:

"The obligations hereunder are joint and several, and *independent of the obligations of Borrower, and a separate action or actions may be brought and prosecuted against Guarantors whether action is brought against Borrower or whether Borrower be joined in any such action or actions; and Guarantors waive the benefit of any status of limitations affecting their liability hereunder or the enforcement thereof.*

"Guarantors waive any right to require Bank to (a) proceed against Borrower; (b) *proceed against or exhaust any security held from Borrower; or, (c) pursue any other remedy in Bank's power whatsoever.*" . . .

3. Not only was the suit never premature under these quoted provisions of the guaranty itself, but the entire subject is now moot in any event. The Joint Adventure, Agreement terminated January 19, 1946, prior to the hearing on the motion on February 4, 1946, and prior to the defendant's answer March 13, 1946, and the Bank's "Consent, etc." terminated with the Joint Adventure. [R. pp. 24, 37-38, 41, 117.] Consequently, and under any theory, the suit was not premature after January 19, 1946, and the question has since been moot in any event.

4. At the opening of the trial, Morrow's counsel admitted as much in effect [R. p. 70], and the point was not thereafter touched on in the record.

II.

The Flaw in the Description of the Note's Date in the Guaranty Is Immaterial; and Did Not Render the Complaint Insufficient.

1. The variance is immaterial, since the note and guaranty were executed as a part of *one transaction*, only *one* \$225,000 note was ever executed, and there is *no question* that the \$225,000 note dated November 18, 1942 is the one *referred to* in the guaranty and intended to be secured thereby. "It is a case of mis-description in part and the maxim '*falsa demonstratio non nocet*' applies."

Snow v. Holmes (1886), 71 Cal. 142, 11 Pac. 856;

Rogers v. Evans (1934), 137 Cal. App. 538, 31 P. (2d) 233;

Text: 41 C. J. 410, Mortgages, Sec. 256, n. 93;

St. Lawrence University v. Farmer (1900), 66 N. Y. Supp. 583, 32 Misc. 410;

Blackburn University v. Weer, 21 Ill. App. 29;

Howland v. Aitch, 38 Cal. 133, 136;

Drovers National Bank v. Browne, 88 Cal. App. 716, 264 Pac. 265.

2. Since the mistake in date is immaterial, an action to reform the guaranty was unnecessary, and a judgment on the complaint without any order of reformation, was proper.

Snow v. Holmes, supra.

3. The complaint averred the execution of the note for \$225,000, and pleaded in par. IV [R. p. 3] that Morrow "made executed and delivered the guaranty for the purpose of guaranteeing in said sum of \$100,000.00 the payment

of said note of \$225,000.” The defendant’s answer [Par. IV, R. pp. 25-26] admitted the execution of the guaranty, but made a general denial of the allegation of the purpose thereof, which thus became an issue in the case. The evidence proved such purpose, and the flaw in date became immaterial. [R. pp. 71-80, 90, 104, 153.] The District Court so held. [R. pp. 47-49, 54.]

III.

Morrow Consented in Advance, in His Guaranty and in His Letter at the Time the Joint Adventure Was Formed, to the Temporary Waiver of Resort to the Mortgaged Chattels Involved in the Bank’s “Consent, Etc.” The District Court Properly so Found on Overwhelming Proof, Although Want of Such Consent Would Not Have Exonerated the Guaranty.

1. Morrow’s guaranty, signed in November, 1942, expressly waived “any right to require the Bank to . . . (b) proceed against or exhaust any security held from the Borrower (the Company); or (c) pursue any other remedy in the Bank’s power whatsoever.” [R. p. 5.] This was a waiver in advance of any right to require the Bank to foreclose the chattel mortgage; and *ipso facto* was a consent for the Bank to defer such foreclosure, as it subsequently agreed to do in its “Consent, etc.”

2. Such waiver by Morrow was certainly effective, until and unless he should make some such affirmative demand for foreclosure as is contemplated by *California Civil Code*, Sec. 2845; and he never made any such demand.

3. On the contrary, on January 10, 1943, Morrow, as president of the Company wrote the Bank as follows [R. pp. 43-44]:

“In our agreement with Fritz Zeibarth, in forming the Morrow Aircraft-Zeibarth joint-adventure, this bank will be required to make the following commitments:

.

“2. Bank shall consent to the use of all tools, fixtures and equipment, patents and patent rights now in possession of Morrow by the joint-adventure and bank shall agree to forbear foreclosure or enforcing any lien on any claim upon or against any of the tools, fixtures or equipment, patents or patent rights, or otherwise interfering with the possession or use thereof during the term of the joint-adventure agreement except with the consent of Zeibarth.

.

“As soon as we have these commitments, the joint-adventure agreement can be entered into.”

Pursuant to this letter, on January 19, 1943, the Bank executed its “Consent, etc.” [R. pp. 37-40] in substantially the language Morrow requested, simultaneously with the execution of the Joint Adventure Agreement. [R. pp. 10-23.]

4. Morrow testified that he never objected to the “Consent, etc.” [R. pp. 105-106]; and on the facts, it was impossible for the Court to conclude otherwise than it did, to wit, that Morrow *did consent* thereto. [R. pp. 50-52, 55-57.]

5. But to avoid exoneration of his guaranty, Morrow's consent to the Bank's "Consent, etc." was unnecessary. This is true for two reasons:

(A) Since the opinion in *Braun v. Crew* (1920), 183 Cal. 728, 192 Pac. 531, which was cited by the District Court [R. p. 49], the rule of exoneration of sureties stated in *California Civil Code*, Sec. 2819 has been modified by the Uniform Negotiable Instruments Law, Secs. 119, and 120, *California Civil Code*, Secs. 3200 and 3201. The new rule is:

Neither the maker nor guarantor, of a negotiable promissory note secured by a mortgage, is exonerated by a binding agreement for an extension of time to foreclose the mortgage, made by the holder of the note with the subsequent transferee of the mortgaged property, who has not assumed the payment of the note, although such extension agreement is made without the knowledge or consent of either the maker or guarantor of the note.

Mortgage Guarantee Co. v. Chotiner (1936), 8 Cal. (2d) 110, 64 P. (2d) 138, 108 A. L. R. 1080 and note p. 1088;

Kaufman v. Penn Mut. L. Ins. Co., 64 F. (2d) 160 (C. C. A., D. C., 1933);

Schram v. Brooks, 41 F. (2d) 874, 876 (D. C., Mich., 1941);

Annotations: 48 A. L. R. 715, 723;

65 A. L. R. 1425.

(B) In view of this modification of Sec. 2819 by Secs. 3200 and 3201 of the *California Civil Code*, Morrow's right to exoneration, if any, as guarantor of a negotiable instrument, would be limited to *proportionate exoneration* (for neglect to proceed against mortgaged security, under *California Civil Code*, Sec. 2845) and would not extend to the *full exoneration* (for release of the mortgaged property, under said Sec. 2819, as modified by Secs. 3200 and 3201.) Sec. 2845 covers the effect of a temporary waiver of resort to other security; and under the rule *cjuidem generis*, Sec. 2819 should have application *only* in event of a full release of such security, rather than to a mere temporary waiver or neglect to subject it. Especially is this true, in view of the new Sec. 3201(6).

Morrow waived in advance any right to rely on *proportionate exoneration under Sec. 2845*, by waiving, in his guaranty, any right to require resort to other security [R. p. 5]; and he is in no equitable position now to invoke the even more stringent rule of *full exoneration under Sec. 2819*, regardless of said Sec. 3201(6).

6. The factual situation in this case is the equivalent of that in *Mortgage Guarantee Co. v. Chotiner*, *supra*, as shown below:

(A) In both cases, the maker of the note was a family corporation, and the note was guaranteed by officers of the company, who were also members of the family;

(B) In each case also, the corporation-maker of the note executed a mortgage to secure the same, and after

negotiating the note, transferred the mortgaged property to another, without the transferee assuming payment of the note. (The only difference is that in the *Mortgage Guarantee Co.* case, there was an outright sale of the mortgaged realty, while in this case the Company temporarily transferred the use of the mortgaged chattels to the Joint Adventure it formed with Fritz Ziebarth. This is a difference without a legal distinction.)

(C) In each case also, the holder of the note agreed with the maker's transferee to postpone foreclosure on the mortgaged property, but without releasing the lien thereon. (The agreement here was made by the Bank with the Joint Adventure, and was subject alone to Ziebarth's consent, and not to the maker's consent. That is, the postponement agreement was actually with a stranger to the note.)

(D) In the *Mortgage Guarantee Co.* case, the California Supreme Court held that the extension agreement with the transferee did not exonerate either the maker or the guarantor of the note under *California Civil Code*, Secs. 2819 and 3201(6), regardless of whether they knew of or consented thereto.

On its facts, the holding in the *Mortgage Guarantee Co.* case is peculiarly pertinent and appropriate here. Morrow was not exonerated, either proportionately or in full, by the Bank's "Consent, etc." His guaranty obligation continued in full, regardless of whether he consented thereto or not.

IV.

The District Court's Memorandum Opinion and Its Findings of Fact and Conclusions of Law Are Fully Supported by the Evidence, and the Judgment Thereon Should Be Affirmed.

MEMORANDUM OPINION OF THE DISTRICT COURT.

[R. pp. 46-52.]

(*Erratum*: Through typographical error the caption of this Opinion appears as "Memorandum Agreement" in the printed record).

"The United States sues as the assignee of a guaranty executed by the defendant in the amount of \$100,000.00. More than \$100,000.00 remains due and unpaid on the primary obligation.

"The case presents two issues: First, when a contract of guaranty contains a recital to the effect that it secures a note of even date therewith, is the guarantor exonerated because the note was actually executed five days later, even though the note and guaranty were executed as part of the same transaction? Second, if the defendant-guarantor were originally bound, did he consent to a modification in the security, or was he exonerated when the obligee contracted not to foreclose on the mortgage securing the note until the termination of a certain joint-adventure?

"In November, 1942, the Morrow Aircraft Corp. (hereinafter called the Corporation), of which the defendant was the president and majority stockholder, needed money to carry on its business in the construction of airplane parts for the national defense. On November 13, 1942, the defendant entered into a contract of guaranty, agreeing to pay the American National Bank of San Bernardino (hereinafter called

the Bank) or order, on demand, the indebtedness of the Corporation 'evidenced by a promissory note of even date herewith, in the face amount of \$225,000.00,' the defendant's liability not to exceed \$100,000.00. The loan was actually made sometime after November 18, 1942, and the promissory note of the Corporation was issued bearing that date. The note was secured by a chattel mortgage on almost all of the property of the Corporation, as well as all of the defendant's stock therein.

"Later in November, 1942, the government placed one Guy L. Goodwin in the plant as manager. In January, 1943, the Corporation began negotiations with one Ziebarth to enter into a joint-adventure for carrying out its contracts. Ziebarth would not close the transaction until the Bank, among other things, had agreed not to foreclose on its mortgage during the existence of the joint-adventure, except with his consent. On January 10, 1943, the defendant, in his capacity as president of the Corporation, signed a letter from him to the Bank, wherein Ziebarth's conditions were stated. This letter was prepared by the Bank preparatory to its execution of the waiver Ziebarth was demanding. On January 19, 1943, the Bank executed a 'Consent, Waiver, and Agreement of Indemnity,' and the joint-adventure was entered into on the same day. The joint-adventure was terminated in January, 1946. The note has been assigned by the Bank to the United States, and the unpaid balance exceeds \$100,000.00.

"A guaranty cannot exist if there is nothing to guarantee. *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812. The defendant contends that since the note purportedly secured by the guaranty did not exist at the time of the execution of the guaranty, the guaranty is of no effect. A guaranty is a contract to answer

for the debt of another, and if the debt does not exist, the guaranty cannot.

“But defendant admits that the guaranty was executed as part of the same transaction with the note. The mere fact that the guaranty was executed before the note will not make it void. In *Howland v. Aitch*, 38 Cal. 133, 136, the court stated that:

“‘It is a matter of no moment at what time, relative to each other, the contracts may have been made and delivered, and the consideration may have passed if they together constituted one transaction.’

The language was applied in *Drovers’ National Bank v. Browne*, 88 Cal. App. 716, 264 Pac. 265, 268, where the defendant had executed a guaranty before the issuance of the note secured, under circumstances very similar to those now under consideration, and the court said that: ‘Defendant cannot complain that the guaranty was executed 5 days before the renewal of the note maturing November 14, 1921.’

“The guaranty refers to a note ‘of even date.’ The words quoted were not intended to limit the defendant’s liability to a note of even date, but merely to describe a note which was to be executed as a part of the transaction. The descriptive words chosen were clearly identified by the defendant’s own testimony. *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856, 858. Therefore, the primary obligation upon which the guaranty could stand did exist, and the defendant was bound upon his guaranty at the time the note was executed.

“It remains to be decided whether the defendant was exonerated because of the modification in the

terms of the security held by the bank. A surety or guarantor is exonerated where the original obligation is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto are in any way impaired or suspended, unless the surety knows of the change and consents thereto. *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531, 534. The defendant had knowledge of the Ziebarth deal, so the sole issue remaining is whether he, as guarantor, consented to the Bank's waiver.

"Consent may be express or implied from the conduct of the surety, but the burden of proof is on the plaintiff to show consent was granted, *Tuohy v. Woods*, 122 Cal. 655, 667, 55 Pac. 683, 684; and the mere fact that the surety remained silent after he had knowledge of the alteration is insufficient in itself to preclude him from claiming the release. *Pacific National Agricultural Credit Corp. v. Hagerman*, 39 N. M. 549, 51 P. (2d) 857, 101 A. L. R. 1301. But when his silence is coupled with affirmative action which would lead the obligee reasonably to believe consent had been given, he is under a duty to obligee to disavow his liability promptly. *Christie v. Commercial Casualty Ins. Co.*, 6 Cal. App. (2d) 710, 45 P. (2d) 263, 267.

"In *Hallock v. Yankey*, 102 Wis. 41, 78 N. W. 156, the defendant, as treasurer of the company whose note he had guaranteed, negotiated several extensions of the note. He was held liable on the guaranty despite the lack of express consent to the change in terms of the original obligation because of his affirmative action. The court said:

" 'Of course, the obligations of a surety are *strictissimi juris*. He may have knowledge that

an extension has been granted to his principal, and the law does not impose on him the duty to speak. 2 *Brandt, Sur.*, Sec. 345. But the surety is bound by the rules of good faith and fair dealing, as well as other men. If he, as agent for the principal debtor, requests and obtains an extension of time, and pays the consideration for such extension, and nothing is said as to his liability as surety, it is very obvious that the creditor would naturally and almost inevitably conclude that he consents to the extension individually, as well as in his capacity as agent. *Cf. Mundy v. Stevens*, 3 Cir., 61 Fed. 77, 85.'

Except that the defendant here was president of the corporation, instead of the treasurer, the cases are almost identical, and the decisions should be the same. The defendant's conduct was such that no reasonable man could but believe that he had consented to the modification in his personal capacity.

"It is difficult to conceive a president of a corporation, owning a controlling interest therein, consenting to a present waiver of the right to foreclose by the holder of the note and in the same breath claiming as an individual he did not consent. Whatever was to the interest of the corporation was certainly to the interest of the defendant. By consenting to the terms of the joint-adventure under his letter of January 10, 1943, he was either unfaithful to the corporation of which he was president or was doing that which he felt furthered the interest of the corporation. His interests and the corporation's were identical. I feel

that the entire picture reflects an implied consent on the part of the defendant.

“I further feel, that notwithstanding defendant’s claim to the contrary, he was at all times a free agent and that he was not a rubber stamp, as he now claims. He is and was a business man of wide experience, and like many other business men, he sought to enter into defense work. His venture evidently was a failure. He took the risk and lost, and now seeks to avoid his just obligations by claiming ignorance of the consequence of his own act.

“The defendant’s contention that consent may be implied only where there is an element of estoppel is not borne out by cases. Consent is none the less real because it is implied, and no element of estoppel is necessary when consent is given. There was nothing to indicate to the Bank that the alteration in security was not made with his consent, and the defendant’s own action in participating in the negotiations preliminary to the alteration by signing the letter of January 10th, without objection or reference to his status as guarantor, strongly indicated that it was given. It is only equitable that he be bound by the terms of the original contract. *Union Oil Co. v. Mercantile Refining Co.*, 8 Cal. App. 768, 97 Pac. 919.

“The plaintiff is entitled to judgment and counsel for the plaintiff is directed to submit forthwith proposed findings and judgment in accordance with this memorandum opinion.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE
DISTRICT COURT.

[R. pp. 53-57.]

Findings of Fact.

I.

“The defendant is a resident of the Southern District of California and within the jurisdiction of this Court.

II.

“On November 18, 1942, the American National Bank of San Bernardino, California, loaned to Morrow Aircraft Corporation the sum of \$225,000, evidenced by promissory note of the Morrow Aircraft Corporation dated November 18, 1942, in the principal sum of \$225,000.

III.

“On November 13, 1942, the defendant herein made, executed and delivered to the American National Bank of San Bernardino his guaranty in writing in the sum of \$100,000 for the purpose of guaranteeing in said sum of \$100,000 the payment of said note of \$225,000.

IV.

“On November 29, 1944, the American National Bank of San Bernardino made, executed and delivered to the United States of America an assignment wherein and whereby, among other things, plaintiff became the holder and owner of said guaranty.

V.

“At the time of filing of this action, and at all times since, there remained due, owing and unpaid upon said \$225,000 note a sum of money in excess of \$100,000.

VI.

“The \$225,000 loan to the corporation was secured by a chattel mortgage on all furniture, fixtures, machinery and equipment, tools, tooling, and accessories owned or to be acquired by the corporation for use in connection with the operation of the manufacturing plant belonging to it.

VII.

“In November of 1942, the Government placed one Guy L. Goodwin in the corporation's plant as manager. Thereafter, in the early part of January, 1943, the corporation began negotiations with one Fritz Ziebarth to enter into a joint adventure for carrying out Morrow Aircraft Corporation's contracts. Ziebarth would not close the transaction until the American National Bank of San Bernardino, among other things, had agreed not to foreclose on its chattel mortgage during the existence of the joint adventure, except with his consent. On January 10, 1943, the defendant in his capacity as president of the corporation signed a letter addressed to the American National Bank of San Bernardino, in which letter the conditions imposed by Ziebarth were stated. On January 19, 1943, the American National Bank of San Bernardino executed a document entitled ‘Consent, Waiver and Agreement of Indemnity’ and the joint adventure was entered into on the same day. The joint adventure was terminated in January 1946.

VIII.

“The defendant owned the majority of stock in the corporation and actively engaged in the conduct of its business. After the said Guy L. Goodwin became manager of the plant, the defendant continued to participate in the corporation's affairs.

IX.

“The defendant had knowledge in the month of November 1942 of negotiations which were then being carried on by and on behalf of the corporation for the purpose of borrowing the sum of \$225,000 from the American National Bank of San Bernardino. He knew that out of said sum of money there was to be paid a then existing obligation of \$100,000 and that he was then obligated as a guarantor of said \$100,000. He also knew that one of the requisites of the new loan was the execution of the guaranty up to \$100,000 hereinabove mentioned. The guaranty was dated November 15, 1942, and the note for \$225,000 was dated November 18, 1942, the loan being consummated some time after November 18, 1942, and each had reference to and constituted one transaction.

X.

“Nine days prior to the execution by the bank of the ‘Consent, Waiver and Agreement of Indemnity,’ the defendant had knowledge of the proposed joint adventure and of its terms and requirements, and on January 10, 1943, in his capacity as president of the corporation, he signed a letter directed to the bank, wherein said requirements and terms were stated.

XI.

“On May 4, 1945, plaintiff demanded of defendant the payment of the sum of \$100,000, in accordance with the terms of the guaranty. Plaintiff has failed and refused to pay the same or any part thereof, and there is now due and owing from defendant to plaintiff the sum of \$100,000, with interest at the rate of 6% per annum from and after said date.”

Conclusions of Law.

I.

“The defendant consented to the execution by the American National Bank of San Bernardino on the 19th day of January, 1943, of the document entitled ‘Consent, Waiver and Agreement of Indemnity’ and is not entitled to judgment under his Separate and Second Defense.

II.

Notwithstanding the fact that the guaranty executed by the defendant bore date November 13, 1942, and the primary obligation described in the guaranty as a note of ‘even date herewith,’ but bearing date November 18, 1942, the execution and delivery of the respective documents were a part of one and the same transaction and constitute consideration for the execution of the guaranty, upon which the plaintiff is entitled to recover.

III.

“Plaintiff is entitled to judgment against the defendant, Howard B. Morrow, in the sum of \$100,000, together with interest at the rate of 6% per annum thereon from May 4, 1945, and for costs and disbursements in this action.

“Let judgment be entered accordingly.”

Conclusion.

The variance in date, between the \$225,000 note and the description thereof in the guaranty, is immaterial; and the American National Bank, in signing the “Consent, Waiver and Agreement of Indemnity” did not agree to any “extension of time” for the payment by Morrow Aircraft Corporation of its said note. The consequences of these conclusions are twofold:

(a) The complaint was sufficient to sustain the judgment.

(b) There was no prematurity of suit, although that issue is now moot.

(c) The “original obligation of the principal” under the note was not “altered, impaired or suspended” by the Bank’s “Consent, etc.,” within the meaning of *California Civil Code, Secs. 2819, 2845, 3200 and 3201*, and even Morrow’s failure to consent thereto would not have exonerated his guaranty under the rule in *Mortgage Guarantee Co. v. Chotiner, supra*.

In addition to all the above, the District Court correctly found as a fact established by overwhelming proof, that Morrow *did consent* thereto, both in advance and at the time the Joint Adventure was formed.

There is no merit to the Appellant’s various contentions.

The judgment of the District Court is obviously correct, on the facts and law, and should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
*Assistant U. S. Attorney,
Acting Chief of Civil Division,*

JAMES C. R. MCCALL, JR.,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 11923

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

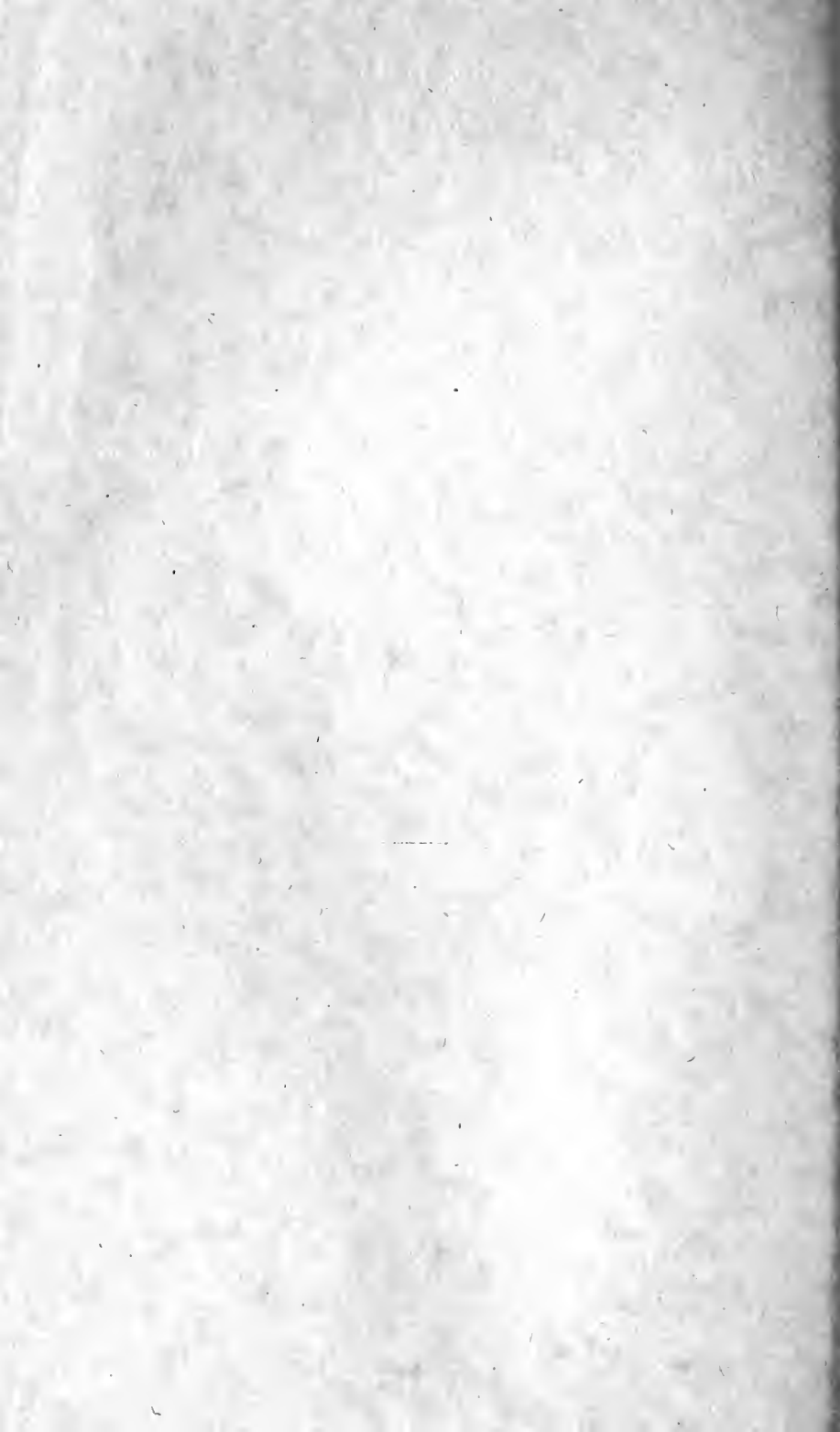
APPELLANT'S REPLY BRIEF.

CURTIS & CURTIS,

207 Andreson Building, San Bernardino,

Attorneys for Appellant.

FILE



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No. 11923

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

APPELLANT'S REPLY BRIEF.

I.

**Answer to Appellee's Argument That the Suit Was
Not Premature and That the Question of Prema-
turity Is Moot.**

1. Appellee contends that the bank's "consent, etc." did not extend the time of payment and had no effect upon the note or its due date, and that such "consent, etc." was merely a temporary waiver of a right to foreclose on one of two securities.

With this contention we cannot agree. The bank's "consent, etc" was a formal, written document, clearly and definitely binding the bank to withhold foreclosure upon the chattel mortgage during the existence of the joint adventure. Since only one action can be brought upon the note (Code Civ. Proc. 726), which action must be one for

the foreclosure of the mortgage, no cause of action arose upon the note either as against the maker or guarantor during the period of the joint adventure. This action was premature at the time the complaint was filed and is still premature.

2. It is not material that the guarantor, by language in the guarantee, waived his right to require the bank to proceed against the borrower, or to proceed against or exhaust any security held from the borrower, or pursue any other remedy in the bank's power. By such waiver the guarantor cannot be construed to have waived his right under the well established rule of law that a cause of action must first exist against the principal before an action can be brought against the guarantor. The reason for such a rule is obvious. A surety or guarantor has the right, upon the payment of the debt, to be subrogated to all the rights of the creditor, and to proceed at once to collect it from the principal. If the creditor has tied his own hands by an extension, then the hands of the surety or guarantor are equally bound (50 Am. Jur. 945).

3. The question of prematurity is not moot. The Appellee overlooks the fact that the question here is whether or not a cause of action existed *at the time the complaint was filed*. That no cause of action existed at that time has been clearly established and the District Court was without jurisdiction to render a judgment in favor of the Appellee.

II.

Answer to Appellee's Argument That the Flaw in the Description of the Note's Date in the Guaranty Is Immaterial and Does Not Render the Complaint Insufficient.

1. This contention has two aspects. We have contended:

a. That the guaranty was executed November 13, 1942, five days before the underlying note was executed, and that in the absence of some allegation in the complaint explaining the discrepancy, or alleging that they were executed as a part of the same transaction, the pleadings are defective and insufficient to support a judgment.

b. That the guaranty executed November 13, 1942, according to its own terms, related to a "note of even date." The note described in the complaint is dated five days later. In the absence of any allegation in the pleading explaining this discrepancy, the pleadings are defective, and a Motion to Dismiss should have been granted. Since the Court refused to grant such motion, these pleadings cannot now support the judgment.

2. Appellant accepts the rule set forth in the case of *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856, and other cases cited by the Appellee, but such rule does not aid Appellee. The following observations should be made in regard to the *Snow* case. First, the mortgage was executed subsequent to the note and therefore a primary obligation existed at the time of the execution of the mortgage. The only "mis-description" was in the mortgage which re-

ferred to a note with a date different from that of the note set out in the complaint. In contrast, the instant complaint referred to a note with a date different from that of the note set out in the complaint. In contrast, the instant complaint refers to a guarantee dated *prior* to the note it purports to guarantee. Furthermore, the guaranty itself refers to a note "of even date" rather than the note referred to in the complaint.

Second, there was an *amended* complaint in the *Snow* case. The original complaint set forth the note and mortgage without any explanation of the discrepancy in dates. The amended complaint explained the discrepancy. If the District Court here had granted Appellant's Motion to Dismiss without prejudice to the Appellee to file a new action; if Appellee had filed a new action dated subsequent to the date of the termination of the Joint Adventure Agreement; and if the new complaint so filed had contained allegations explaining the discrepancy and an allegation that the note and guaranty were a part of one transaction, then such complaint might have given the District Court jurisdiction to render judgment in favor of Appellee. The fact is, however, that the judgment was rendered on a complaint that did not and could not state a cause of action because of inconsistencies and prematurity evident on its face. Such judgment, so rendered, is void for lack of jurisdiction.

III.

Answer to Appellee's Argument That Morrow Consented in Advance, in His Guaranty and in His Letter at the Time the Joint Adventure Was Formed, to the Temporary Waiver of Resort to the Mortgaged Chattels Involved in the Bank's "Consent, etc." The District Court Properly so Found on Overwhelming Proof Although Want of Such Consent Would Not Have Exonerated the Guaranty.

1. We readily concede that the Appellant waived his right to require the bank to foreclose on the chattel mortgage, but by such waiver Appellant did not agree that the bank might enter into a binding agreement with the debtor not to foreclose, for such agreement would jeopardize or destroy the rights of the guarantor in the event of subrogation. There is nothing in the guaranty itself which can be construed as a consent on the part of the guarantor to any extensions by the bank.

2. We have already shown in Appellant's Opening Brief, that the letter upon which Appellee relies [Ex. 1, Tr. of Rec. pp. 43-44] as being an act of the Appellant from which his consent to the extension can be implied, is a letter from Morrow Aircraft Corporation, the debtor, and any representations therein contained are those of the corporation, and not those of the Appellant individually. We have also shown that the letter does not purport to be a consent, nor does it even amount to a request on the part of Morrow Aircraft Corporation for an extension. We have further contended that such letter does not purport to be the consent of the Appellant to the extension, and that its execution, under the circumstances related in our Opening Brief, is not such as to justify the inference of

consent on the part of the Appellant personally. As we have fully developed this argument in our Opening Brief, we refer to it for a more complete statement of our position.

3. Appellee now makes the rather unique and revolutionary argument that a guarantor is not exonerated where the holder extends the time of foreclosure even though the extension be made without the knowledge or consent of the guarantor. This contention is entirely without support and is directly contrary to the provisions of Section 2819, Civil Code of California. In support of this contention, Appellee cites the case of *Mortgage Guarantee Co. v. Chotiner*, 8 Cal. (2d) 110, 64 P. (2d) 138. A careful reading of this case will reveal, however, that Appellee has completely misconstrued the point of the case. In that case, the Chotiner Building Corporation executed a note and deed of trust. The defendants were stockholders of the corporation and executed a written guarantee on the back of the note expressly authorizing extensions without notice. The land underlying the trust deed was sold to a new grantee and the original payee negotiated the note and deed of trust to the plaintiff. The plaintiff, holder, made binding extension agreements with the new grantee of the property without the consent of the maker, or guarantors. Unlike the present case, the guarantors in the *Mortgage Guarantee Co.* case specifically and in writing *authorized extensions without notice* (8 Cal. (2d) 110 at 111) which they were attempting to avoid by parol evidence. The Appellate and Supreme Courts held that the introduction of parol evidence was error. Obviously, the grantors could not claim exoneration as the result of an extension after having specifically authorized the extensions without notice.

It was next argued that the Chotiner Building Corp., the original mortgagor, became a surety after conveying the property to the new grantee, and that the new grantee became the principal debtor. It was argued that there being no express waiver of any extensions without notice on the part of the Chotiner Building Corp., and since the Chotiner Building Corp. was now a surety, consequently an extension without its consent released the Chotiner Building Corp., and that since the Chotiner Building Corp. was released and was the primary debtor upon the obligation guaranteed by the defendants, that the defendants in turn were released. This argument raises a question quite foreign to the discussion here, namely, does the maker of a note secured by a mortgage, become a surety upon the conveyance by him of the security, subject to the indebtedness, to a third person. As to this point there is apparently a split of authority. According to the *Mortgage Guarantee Co.* case the majority rule is that such maker does not become a true surety, and therefore does not enjoy all the rights and privileges of a surety, one of which is to be exonerated in the event of an extension without his consent. The minority rule is to the effect that such maker is a surety, and like a surety or guarantor, is entitled to such exoneration. The case of *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531, which apparently had been the law of California prior to the *Mortgage Guarantee Co.* case, followed the minority rule and was presumably overruled by the *Mortgage Guarantee Company* case. Neither the *Mortgage Guarantee Company* case nor the *Negotiable Instruments Law* have modified in any respect the general

rule that a surety or guarantor is exonerated where the original obligation is altered, or the remedy or rights of the creditor against the principal in respect thereto are in any way impaired or suspended unless the surety knows of the change, and consents thereto.

Conclusion.

Appellant's position throughout this case may seem highly technical, but many times one who in all fairness and good morals is entitled to relief (and we believe the Appellant here is such) has nothing upon which to rely in a court of law but strict legal defenses. However, Appellant's contentions, though technical, are nevertheless cogent and compelling reasons, we believe, for reversing the District Court.

1. In the first place there can be no doubt but that this action was prematurely brought. No cause of action existed against the Appellant at the time the complaint was filed. To ignore this fact, or to gloss over it is to do violence to the sanctity of legal principles which guide both courts and lawyers.

2. There is a material and fatal inconsistency in the pleadings in this case in that it is alleged in effect that the Appellant guaranteed payment of a note dated November 13, 1942, whereas elsewhere in the complaint it appears that the note upon which the Appellees have relied is dated November 18, 1942. There is no allegation which in any way explains or attempts to explain this inconsistency. The pleadings are therefore defective and cannot support the judgment. To ignore this defect in the pleadings is likewise to do violence to the sanctity of the law.

3. It is universally held that a guarantor is exonerated where there is a material alteration of the original indebt-

edness or the remedies or rights of the creditor against the principal has been impaired or suspended unless the guarantor knows of the change *and consents thereto*.

4. Although the Appellant had knowledge of the extension, he did not expressly consent to the alteration and consent, if it is to be found at all, must be implied. The only act from which it may be implied is the letter [Appellee's Ex. 1, Tr. of Rec. pp. 43-44], which was signed by Appellant as president of the debtor corporation. The courts have implied consent only in cases in which the conduct of the guarantor has been affirmative and where it has been such as to estop him from denying consent. The conduct must be such as to mislead the creditor, and the creditor must reasonably rely upon this conduct. In the present case, the bank, through its own representatives, arranged the entire transaction of which the extension was a part, and the bank further undertook to prepare and get together all the papers and documents necessary to carry it into effect, but nothing was done to obtain Appellant's consent. In this they were not misled, nor did they rely upon any conduct of the Appellant. Consent, therefore, cannot properly be implied.

The obligation of a guarantor has always been *strictissimi juris*. In the light of the foregoing, the judgment of the District Court cannot be supported and must be reversed.

Respectfully submitted,

CURTIS & CURTIS,

Attorneys for Appellant.

No. 11924

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. G. ROLE,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation,
and United States of America,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

JUL -2 1948

PAUL P. O'BRIEN,
CLERK

No. 11924

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. G. ROLE,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation,
and United States of America,

Appellees.

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Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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America, Intervenor. [1*]

* Page numbering appearing at foot of page of original certified
Transcript of Record

In the District Court of the United States in and
for the District of Montana, Great Falls
Division

No. 948

A. G. ROLE,

Plaintiff,

vs.

J. NEILS LUMBER COMPANY, a Corporation,
Defendant,

and

UNITED STATES OF AMERICA,

Intervenor.

Be It Remembered, that on April 10, 1947, a
Complaint was duly filed herein, in the words and
figures following, to wit: [2]

COMPLAINT

The plaintiff, for claim and demand against the
above named defendant, alleges:

I.

That the plaintiff, at all times herein alleged, was
an employee of the defendant and that he has been
duly authorized and designated in writing by the
persons named in Schedule "A", hereto annexed,
to maintain this action as their agent and repre-
sentative and that he brings this action for himself
and for all other employees of the defendant who
are or were situated similarly to himself and those
named in Schedule "A" who may join in this action

by intervention, amendment, designation or otherwise.

II.

This action arises under the provisions of the Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. A., Secs. 201-219, known as the Fair Labor Standards Act of 1938, a law of the United States regulating interstate commerce, and jurisdiction of this action rests in this Court under the authority of 28 U. S. C. A., Section 41 (8) and Section 16 (b) of the Fair Labor Standards Act, 29 U. S. C. A., Section 216 (b).

III.

The defendant, J. Neils Lumber Company, hereinafter referred to and called "the company" is now and at all times herein alleged was a corporation organized and existing under [3] the laws of the State of Minnesota and duly qualified to do business within the State of Montana with its principal place of business at Libby, Montana, and is engaged in logging and producing various lumber products for sale primarily in interstate commerce. That plaintiff and the employees whose names are set forth in Schedule "A" and all those similarly situated who hereafter join in this action, are or were at all times herein alleged engaged in defendant's logging operations at or in the vicinity of Troy, Libby, and Warland, Montana, and said employees at all times materially hereto were engaged in the production of goods, to wit: logs and poles for interstate commerce and in processes and occupations necessary to such production of said goods

and products for the defendant in interstate commerce.

IV.

The defendant, at all times herein mentioned, conducts extensive logging operations near Troy, Montana, and near Warland, Montana, with shops and supply rooms at Troy for the Troy operations and at Warland for the Warland operations. That in connection with such operations, the defendant has built and maintained extensive roads in the forests where the logging operations are maintained. That the employees live in Libby, Troy or Warland. That to transport the employees to the logging operations, defendant operates buses from Libby, Troy and Warland and the employees are regularly transported on each working day from Libby, Troy and Warland to the logging operations and returned by the defendant in such buses.

V.

Since on or about April 10, 1945, the defendant company has employed the employees, herein suing and represented, and those similarly situated who may hereafter join in this action *in this action*, in the production of goods for [4] interstate commerce as aforesaid for work weeks longer than forty hours and has failed and refused to compensate said employees for their employment in excess of forty hours in such work weeks at rates not less than one and one-half times the rates at which said employees were employed. The time for which defendant employed said employees as aforesaid in excess

of forty hours per work week and for which defendant did and does fail and refuse to compensate said employees was the time spent by said employees: (a) traveling in the defendant's bus from Libby to Troy and thence to the defendant's logging operation in vehicles furnished by the defendant and subject to the defendant's control prior to 8:00 a.m. on each work day, the said 8:00 a.m. being the regularly scheduled time for the beginning of the work shift in each day; (b) traveling from Libby to Warland and thence to the logging operations of the defendant in vehicles furnished by the defendant and subject to the defendant's control prior to 8:00 a.m. on each work day, the said 8:00 a.m. being the regularly scheduled time for the beginning of the work shift in each day; (c) traveling from the defendant's logging operations under the defendant's control and direction after 4:30 p.m. on each work day, the said 4:30 p.m. being the designated end of the regular work shift to Troy and to Libby; (d) traveling from the defendant's logging operations under the defendant's control and direction after 4:30 p.m. on each work day, the said 4:30 p.m. being the designated end of the regular work shift to Warland and Libby; (e) in obtaining, handling, carrying, caring for and putting away tools and receiving orders and notices for the conduct of the business of defendants prior to 8:00 a.m. and after 4:30 p.m. each work day at Troy and at Warland and at the sites of the logging operations of defendant and between [5] said camp and said sites, said 8:00 a.m. being the designated time for

the beginning of each work shift and the said 4:30 p.m. being designated as the time for the ending of each work shift; that all of said work was performed prior to the scheduled starting time fixed by the defendant or subsequent to the scheduled quitting time fixed by the defendant. That such time so worked as aforesaid required the expenditure of mental and physical energy and labor by the employees herein suing and others similarly situated and who may hereafter join in this action as aforesaid, and such physical energy and labor are essential, necessary for, and required by the very character and nature of the work performed by the employees and were and are pursued necessarily and primarily for the use and benefit of the defendant and its business and were and are required and controlled by the defendant and as such constitutes work and labor within the meaning of the Fair Labor Standards Act of 1938.

VI.

During each week since April 10, 1945, to the date of filing this Complaint the hours between the scheduled starting times and quitting times added to the periods which the employees were required to work or were suffered or permitted to work prior to scheduled starting times and subsequent to scheduled quitting times, as hereinbefore set forth, have totalled in excess of forty hours per week and during each of said weeks the defendant has failed and refused to pay to the said employees any compensation or to compensate them at one and one-half ($1\frac{1}{2}$)

times the regular rate of pay for all hours worked in excess of forty hours per week as herein set forth.

VII.

Plaintiff is not informed as to the exact amount [6] of overtime work rendered by each of the employees or the wages still due and owing for overtime hours worked for which no payment was made in violation of the Fair Labor Standards Act of 1938; that such information is not available to the employees who are represented in this action but records including such information are, or should be, under the provisions of said Fair Labor Standards Act, in exclusive possession of the defendant. That interrogatories are attached hereto which plaintiff respectfully asks the Court on behalf of himself and those named in Schedule "A" and all others who may hereafter join in this action, as aforesaid, to counsel defendant to answer.

Wherefore, plaintiff demands judgment in favor of the plaintiff and against the defendant for:

1. A determination of the amount due for labor performed and time spent by each employee for whom this action is brought, as herein alleged;
2. The respective amounts so determined;
3. An equal additional amount as liquidated damages;
4. Court costs and reasonable attorney's fees;
5. That defendant answer the Interrogatories hereto annexed and account to all employees

joined herein for the wages due them for overtime since April 10, 1945;

6. Such other and further relief as may be just and proper in the premises.

LEIF ERICKSON,

H. L. MAURY,

A. G. SHONE,

Attorneys for Plaintiff.

Complaint drawn by: Leif Erickson, Union Bank Bldg., Helena. [7]

INTERROGATORIES

Give for the plaintiff and for each employee named in Schedule "A" attached to the complaint for each work week subsequent to April 10, 1945, to the date of the filing of the complaint:

1. The job classification.
2. The scheduled starting and quitting times.
3. The total number of hours worked.
4. The total number of hours for which compensation was paid.
5. The regular hourly rate or the base and rate of pay if not on a regular hourly rate basis.
6. The number of hours compensated at overtime rates.
7. The total amount paid.
8. The scheduled departure time; or in the absence of a scheduled departure time, the approximate or usual departure time of the applicable vehicle of defendant used to transport the employee from Libby, Troy or Warland, as the case may be, to the sites of the

actual active logging operations as the case may be.

9. The scheduled arrival time; or, in the absence of a scheduled arrival time, the approximate or usual arrival time at Troy, Libby or Warland, as the case may be, of the applicable vehicle of defendant used to transport the employee after the scheduled Court time, from the sites of actual active logging operations as the case may be. [8]

SCHEDULE "A"

Anderson, Vester	Deyerle, Earl
Augu, Louis H.	Docken, Bernt
Bailey, Van O.	Evans, Roy L.
Barrett, Patrick R.	Flight, Ray A.
Benefield, Clay E.	Goodgame, Allen
Brown, Clarence	Hagen, Andrew
Brown, James	Hammons, Fred J.
Carlson, Oscar	Hanson, Howard E.
Carr, J. A.	Hartsock, William
Carvey, Edward F.	Haugset, Einar
Caudill, Wm.	Johnson, Robert L.
Childs, Roland	Johnston, Joe
Cole, Francis E.	Jones, Arthur P.
Conrad, Lawrence	Keller, Gerald
Cook, Ottis A.	Kimber, Vernon M.
Cripe, Frank	Kudbow, Delbert
Cripe, Rufus	Larson, Bunnar
Croucher, Francis	LeCount, V. L.
Decker, Harold M.	Madison, Dewey D.
Dennis, Robert J.	Martius, John P.

Martin, Arthur P., Jr.	Radan, N. R.
Martin, Elmer W.	Rice, Wm. H.
McCann, Mike	Sandous, James B.
McColley, A. L.	Schafer, Fred
McGill, Darrell N.	Schumerhorn, Wm. R.
Militan, Joe	Shaupatser, J. T.
Montgomery, Frank	Shiflett, Calvin
Mortinick, Mike	Skranak, Geo. J.
Munro, H. J.	Smith, Richard K.
Nead, Ralph D.	Smith, Wm.
Nellis, Marvin B.	Spencer, Ernest
Nellis, W. E.	Spencer, Forrest F.
Nelson, Fred D.	Spencer, Kenneth C.
Nelson, John H.	Spencer, Leonard
Nelson, Tom E.	Spencer, Ralph E.
Nocerini, Roy N.	Spencer, Vern
O'Brien, Fred D.	Stevens, Geo.
Orr, Carl	Stone, Matthew
Ostheller, E. C.	Stout, Herbert M.
Page, Rollin J.	Sweet, Franklin C.
Parker, Dan	Thomason, Roy M.
Pamenter, Edgar A.	Torbert, L. V.
Pearson, Walter E.	Tumis, Nicholas
Pearson, Wm. C.	Vinion, John S.
Peck, Arthur F.	Walters, Clarence E.
Perry, Wm. C., Jr.	Walker, Dale
Plotts, Robert	Young, Albert R.
Poesing, Thos.	Zimmerman, Walter P.
Ptuekee, Stein	Zimmerman, M. C.

[Endorsed]: Filed April 10, 1947. [9]

Thereafter, on May 3, 1947, a stipulation to amend Complaint by interlineation was duly filed herein, being in the words and figures following, to wit: [10]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto through their respective attorneys as follows:

1. That the complaint of plaintiff may be amended by interlineation or otherwise in the following particulars:

By striking from the complaint the words and figures "June 25, 1940," wherever the same appear, and substituting therefor the words and figures "April 10, 1945," in each instance, and the Clerk is hereby authorized to make such amendment on the face of the complaint in each of the following places:

Page 2, Paragraph V, line 29.

Page 4, Paragraph VI, line 19.

Page 5, Paragraph 5 of the prayer in lines 23 and/or 24.

Line 4 of the page entitled "Interrogatories."

2. That the defendant may have to and including the 31st day of May, 1947, in which to appear and to plead to the complaint.

3. That defendant may have to and including the 31st day of May, 1947, to file objections to the

interrogatories, including but not limited to the right to object on the ground that said interrogatories [11] are premature.

Dated this 2nd day of May, 1947.

LEIF ERICKSON,
H. L. MAURY,
A. G. SHONE,
By LEIF ERICKSON,
Attorneys for Plaintiff.

Address: 17 Union Bank Building, Helena,
Montana.

CHARLES A. HART,
ART JARDINE,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
By /s/ S. B. CHASE, JR.,
Attorneys for Defendant.

[Endorsed]: Filed May 3, 1947. [12]

Thereafter, on May 5, 1947, an order to amend the complaint by interlineation was duly filed, entered and noted in the civil docket, in the words and figures following, to wit: [13]

[Title of District Court and Cause.]

ORDER

Pursuant to stipulation of counsel for the respective parties, and the Court being fully advised,
It Is Hereby Ordered:

1. That the complaint of plaintiff may be amended by interlineation or otherwise in the following particulars:

By striking from the complaint the words and figures "June 25, 1940," wherever the same appear, and substituting therefor the words and figures "April 10, 1945," in each instance, and the Clerk is hereby authorized to make such amendment on the face of the complaint in each of the following places:

Page 2, Paragraph V, line 29.

Page 4, Paragraph VI, line 19.

Page 5, Paragraph 5 of the prayer in lines 23 and/or 24.

Line 4 of the page entitled "Interrogatories."

2. That the defendant may have to and including the 31st day of May, 1947, in which to appear and to plead to the complaint.

3. That defendant may have to and including the 31st day of May, 1947, to file objections to the interrogatories, including but not limited to the right to object on the ground that said interrogatories are premature.

Given and Made this 5th day of May, 1947.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed May 5, 1947. [14]

Thereafter, on June 9, 1947, an Answer was duly filed herein, in the words and figures as follows, to wit: [15]

[Title of District Court and Cause.]

ANSWER

Now comes defendant, J. Neils Lumber Company, a corporation, and answers the complaint herein as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

I.

Answering paragraph I of the complaint, defendant states that it has no knowledge or information sufficient to form a belief as to the authority alleged to have been given by the persons named in Schedule A attached to the complaint. Defendant alleges that none of the persons listed in said Schedule A has filed in this Court his consent in writing to become a party to this action.

II.

Defendant admits that this action is brought pursuant to provisions of the Fair Labor Standards Act of 1938, but defendant alleges that this Court has no jurisdiction of the subject matter of this action because of the provisions of the Portal-to-Portal Act of 1947, which became effective on May 14, 1947. [16]

III.

Defendant admits that it is a corporation organized and existing under the laws of the State of Minnesota and is duly qualified to do business within the State of Montana, as alleged in paragraph III of the complaint. Defendant admits that certain of the employees listed in Schedule A attached to the complaint, but not plaintiff, were employed in defendant's logging operations in the vicinity of Troy or in the vicinity of Warland, Montana. Defendant admits that during the times referred to in the complaint it was engaged in the manufacture of lumber and lumber products a large portion of which was shipped in interstate commerce, and admits that its logging operations were carried on for the purpose of producing logs for use in defendant's manufacture of lumber and other products.

Except as so admitted, defendant denies each and every allegation of paragraph III of the complaint.

IV.

Defendant admits that during the times referred to in the complaint it conducted logging operations in the vicinity of Troy, Montana, and in the vicinity of Warland, Montana, and that it built and maintained roads for the purpose of reaching said logging operations. Defendant admits that certain of its employees lived in Libby, Troy, and Warland, or in the vicinity thereof. Defendant admits that it has operated buses for the purpose of transporting its employees between Troy and the log-

ging operations adjacent thereto, and between Warland and the logging operations adjacent thereto, but defendant denies that it has operated buses between Libby and Troy or between Libby and Warland.

V.

Defendant admits that during the times referred to in [17] the complaint it provided transportation for those of its employees who desired to use such transportation between Troy and defendant's logging operations in the vicinity of Troy, and between Warland and defendant's logging operations in the vicinity of Warland, and that the transportation to and from the logging operations occurred prior to the regularly scheduled time for the beginning of the work shift for each day and at the end of the scheduled time for such work shift.

Except as so admitted, defendant denies each and every allegation of paragraph V of the complaint.

VI.

Defendant admits that it has not made payment to its employees for the time spent in traveling to and from the logging operations at which its employees worked.

Except as so admitted, defendant denies each and every allegation of paragraph VI of the complaint.

VII.

Defendant admits that its records disclose the amount of time worked by each of its employees during the periods referred to in the complaint.

Except as so admitted, defendant denies each and every allegation of paragraph VII of the complaint.

Third Defense

I.

Defendant alleges that at all times when the persons listed in Schedule A of the complaint worked in its logging operations subsequent to April 10, 1945, there was in effect a collective bargaining agreement between defendant and a union which was the duly designated bargaining agent of defendant's employees and which union each of the employees listed in Schedule A is or was a member. Said agreement [18] constituted the contract of employment between defendant and each of said employees and prescribed the terms and conditions of said employment. Said contract required no work or service of any of said employees prior to their arrival at or after leaving the place of work in the woods and did not contemplate or require any control by defendant as employer over any of said employees while said employees were traveling to and from the place of work; and in the performance of said contract during all of the times referred to in the complaint, no work or service was required of or was rendered by any of said employees during said traveling period and no control was exercised by defendant as employer over any of said employees during said traveling period.

II.

Defendant alleges that none of the employees referred to in the complaint performed any work

or service or duty for defendant other than as required or contemplated by said contract of employment, and each and all of said employees have been paid in full for all hours of employment in defendant's service.

Fourth Defense

Defendant alleges that during all the times referred to in the complaint the work required of defendant's employees and the compensation to be paid therefor were fixed by a valid contract of employment, and that under said contract of employment the time spent by defendant's employees in traveling to and from their place of work was not hours of employment or work time; and defendant alleges that the Fair Labor Standards Act of 1938, if interpreted as invalidating said contract, will deprive defendant of its property without due process of law, [19] contrary to the provisions of the Fifth Amendment to the Constitution of the United States, and is therefore invalid and unenforceable.

Fifth Defense

Defendant alleges that time spent by its employees in traveling to and from the place at which their regularly scheduled work was carried on and in obtaining, handling, carrying, caring for, and putting away tools, and receiving orders and notices, for which compensation is demanded in the complaint herein, was not compensable either (1) by any provision of a written or non-written contract then in effect between said employees and their collective

bargaining representatives and defendant, or (2) by any custom or practice then in effect between said employees and defendant; and defendant alleges that under the provisions of the Portal-to-Portal Act of 1947, which became effective May 14, 1947, defendant is not liable for the claims asserted in the complaint herein.

Wherefore defendant prays that judgment be entered dismissing this action and awarding defendant costs and its disbursements herein.

ART JARDINE,
S. B. CHASE,
JOHN D. STEPHENSON,
Attorneys for Defendant.

Of Counsel:

JARDINE, CHASE & STEPHENSON,
CHARLES A. HART,
HART, SPENCER, McCULLOCH &
ROCKWOOD,
Portland, Oregon.

[Endorsed]: Filed June 9, 1947. [20]

Thereafter, on June 10, 1947, Suggestion of Lack of Jurisdiction and Motion for Judgment on Pleadings was duly filed herein, being in the words and figures follows, to wit: [21]

[Title of District Court and Cause.]

SUGGESTION OF LACK OF JURISDICTION
AND MOTION FOR JUDGMENT ON
PLEADINGS

Now comes defendant and suggests that the Court lacks jurisdiction of the subject matter of this action for the following reasons:

The action seeks to impose liability upon defendant pursuant to the Fair Labor Standards Act of 1938 (29 U.S.C.A. Sections 201-219, inclusive) to recover compensation for activities which were not compensable either by an express provision of a written or non-written contract of employment between defendant and the employees for whom the action is brought, or by any custom or practice covering such activities in effect between defendant and such employee. Under the provisions of subsection (d) of Section 2 of the Portal-to-Portal Act of 1947, which became effective May 14, 1947, this Court is deprived of jurisdiction of any action or proceeding to enforce any such liability as that asserted in the complaint.

In the alternative, defendant moves for judgment on the pleadings herein and in support of said motion respectfully shows:

The pleadings disclose that this action is brought on behalf of employees of defendant to recover compensation for or on account of activities which were not compensable either by an express provision of a written or non-written contract of employment between defendant and such employees, or by any

custom or practice covering such activities in effect between defendant and such employees.

Subsection (a) of Section 2 of the Portal-to-Portal Act of 1947, which became effective May 14, 1947, provides that no employer shall be subject to any such liability as that sought to be imposed upon defendant in this action.

/s/ ART JARDINE,

/s/ JOHN D. STEPHENSON,

/s/ S. B. CHASE, JR.,

Attorneys for Defendant.

By S. B. CHASE, JR.

Of Counsel

JARDINE, CHASE & STEPHENSON,

Great Falls, Montana, 410 First National
Bank Bldg.

CHARLES A. HART,

HART, SPENCER, McCULLOCH &
ROCKWOOD,

Portland, Oregon.

[Endorsed]: Filed June 10, 1947. [23]

Thereafter, on October 31, 1947, Motion of the United States to Intervene and for time to file brief, etc., was duly filed herein, being in the words and figures following, to wit: [24]

[Title of District Court and Cause.]

MOTION OF THE UNITED STATES TO INTERVENE AND FOR TIME WITHIN WHICH TO FILE A BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947 AND THE FAIR LABOR STANDARDS ACT OF 1938

Now comes the United States of America, by its Attorney General and pursuant to the Act of August 24, 1937 (c. 754, sec. 1, 50 Stat. 751, 28 U.S.C. § 401), moves to intervene and become a party to this action for the purposes and with all the rights provided by said Act of August 24, 1937, upon the ground that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, and of the Fair Labor Standards Act of 1938, approved June 25, 1938, has been drawn in question in this action, and neither the United States nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto.

The United States further moves that the Court receive its pleading, entitled "Pleading of the United States in Intervention," which accompanies this motion in accordance with Rule 24(c) of the Federal Rules of Civil Procedure, as its appearance in this action in support of the constitutionality of the said Portal-to-Portal Act of 1947 and the said Fair Labor Standards Act of 1938 and in opposition to all pleadings, motions, and proceedings of any of the parties hereto, denying the validity of the said

Acts, or any part thereof, upon the ground that they are unconstitutional. [25]

The United States moves also for leave to file a brief within 30 days after service upon it of plaintiff's brief or such other time as the Court may deem reasonable.

TOM C. CLARK,

Attorney General.

By /s/ HERBERT A. BERGSON,

Acting Assistant Attorney
General.

/s/ JOHN B. TANSIL,

United States Attorney.

Of Counsel:

ENOCH E. ELLISON,

Special Assistant to the Attorney General.

JOHANNA M. D'AMICO,

Attorney, Department of Justice.

[Endorsed]: Received and filed Oct. 31, 1947.

Thereafter, on October 31, 1947, Order granting leave to the United States of America to intervene was duly entered in the minutes of the Court, in the words and figures following, to wit: [27]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO
UNITED STATES TO INTERVENE

At this time Mr. Franklin A. Lamb, Assistant United States Attorney, filed and presented to the

Court a motion of the United States for leave to intervene herein, and for time within which to file a brief in support of the constitutionality of the Portal-to-Portal Act of 1947, and the Fair Labor Standards Act of 1938, whereupon Court ordered that said motion be and is granted. Thereupon a pleading of the United States in intervention was filed by Mr. Lamb.

Entered in open Court at Billings, Montana,
October 31, 1947.

H. H. WALKER,
Clerk. [28]

Thereafter, on October 31, 1947, Pleading of the United States in Intervention was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES
IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention, says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.
2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, and the Fair Labor Standards Act of 1938, approved June 25, 1938, conforms in all respects to the provi-

sions and requirements of the Constitution of the United States and are existing and valid laws of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 and the said Fair Labor Standards Act of 1938 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of these Acts, it should first consider the other defenses raised by the defendant, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question. [30]

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947 and the Fair Labor Standards Act of 1938.

TOM C. CLARK,

Attorney General.

By /s/ HERBERT A. BERGSON,

Acting Assistant Attorney
General.

/s/ JOHN B. TANSIL,

United States Attorney.

Of Counsel:

ENOCH E. ELLISON,

Special Assistant to the Attorney General.

JOHANNA M. D'AMICO,

Attorney, Department of Justice.

[Endorsed]: Filed Oct. 31, 1947. [31]

Thereafter, on December 19, 1947, the Decision of the Court was duly filed herein, being in the words and figures following, to wit: [32]

In the District Court of the United States in and
for the District of Montana, Great Falls
Division

Civil Action No. 948

A. G. ROLE,

Plaintiff,

vs.

J. NEILS LUMBER COMPANY,
a Corporation,

Defendant.

DECISION OF THE COURT

This action was commenced April 10, 1947, under the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201-219). The defendant is a corporation engaged in logging operations in Montana and in producing various kinds of lumber products for sale and shipment in interstate commerce. That since about April 10, 1945, the employees of defendant, herein suing and represented, and others similarly situated who may later join in this action, have been engaged in the production of goods for interstate commerce, and in so-called portal-to-portal activities for work weeks longer than forty hours for which defendant has failed and refused to compensate them for such excess labor at rates not less than one and one-half times the rates at which said employees were employed.

Defendant alleges that this court has no jurisdiction of the subject matter of the complaint herein because of the provisions of the Portal-to-Portal Act (29 U. S. C. A. 251 et seq.) which became effective May 14, 1947, and "that the time spent by its employees in traveling to and from the place at which their regularly scheduled work was carried on and in obtaining, handling, carrying, caring for, and putting away tools, and receiving orders and notices, for which compensation is demanded in the complaint herein, was not compensable either (1) by any provisions of a written or non-written contract then in effect between said employees and their collective bargaining representative and [33] defendant, or (2) by any custom or practice then in effect between said employees and defendant"; and that defendant is not liable for the claims asserted in the complaint under the provisions of the Portal-to-Portal Act of 1947.

In response to this defense, plaintiff asserts that "Part II of Public Law 49 (the Portal-to-Portal Act) contravenes the Fifth Amendment of the Constitution of the United States which prohibits 'the taking of property without due process of law,' and that subsections a, b and c of Section 2 are retrospective legislation whose objects is to destroy existing vested rights without due process"; also that the Portal-to-Portal Act attempts to redefine working time which is a judicial and not a legislative act and would be in violation of Article 3 of the Constitution.

Congress enunciated its policy and findings in Section 1 of the Portal-to-Portal Act which the courts have uniformly held do not constitute a usurpation of judicial power, and are not in conflict in any way with the findings and policy of Congress contained in Section 2 of the Fair Labor Standards Act, upon which the "portal-to-portal" claims are based. Does this Act infringe upon the decision in the *Mt. Clemens Pottery* case; it does not so appear from the language of the Act itself; contracts and practices which arose in pursuance of the terms of the Fair Labor Standards Act remained undisturbed; final judgments for "portal-to-portal" pay, where unpaid, are valid obligations.

In approving this legislation Congress was dealing with present existing conditions which the Act was intended to remedy, and in its operation was prospective rather than retrospective; while it dealt with claims based upon former legislative acts they were still existing claims at the time the Portal-to-Portal Bill was enacted. The Supreme Court held that the activities in question were compensable, subject to the "de minimis" doctrine. The claims in the *Gold Clause* case had also been sustained in the courts, *Norman v. Baltimore & Ohio R. R. Co.*, 294 U. S. 240; [34] *Gregory v. Morris*, 96 U. S. 619. "Portal-Portal" claims based upon contract are still enforceable and no bar thereto is interposed by the Portal-to-Portal Act; but it seems to be clearly established that employers are no longer liable for payment of such claims where they rest solely upon the prior Act. Congress may repeal

a statute granting gratuities and imposing penalties, and unless a saving clause is included, all prior liability thereunder is thereby terminated. *Norris v. Crocker*, 13 Howard 429, 440; *U. S. v. Chambers*, 291 U. S. 217, 222-226, and cases there cited; *Lynch v. U. S.*, 292 U. S. 571, 577; *Flanigan v. Sierra County*, 196 U. S. 553, 560. The "Portal-to-Portal" benefits of the Labor Act came as a "windfall" to employees, and may be considered as purely statutory benefits, and at all times subject to the legislative will that created them. *McNair v. Knott*, 302 U. S. 369, 372, 374 (and cases there cited); *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 311-312, 314-316; *Louisiana v. Mayor*, 109 U. S. 285, 287-288; *In re Hall*, 167 U. S. 38, 42; *Ewell v. Daggs*, 108 U. S. 143, 151.

The Attorney General has convincingly demonstrated that "insofar as rights given by the Fair Labor Standards Act have not, in fact, become terms of employment contracts they may be withdrawn by the Congress. Section 2 of the Portal-to-Portal Act of 1947 which relieves employers of the liability of the so-called portal-to-portal claims goes no further and is clearly constitutional. Even without its plenary power to terminate the portal-to-portal claims by withdrawing their legislative support, the Congress clearly had the power to do so through exercise of its powers over interstate commerce." In a lengthy and exhaustive brief the Attorney General has cited abundant authority to sustain his position.

Contracts between private parties are entered

into subject to existing laws of the United States, and also any changes which Congress may lawfully make in them. *Louisville & Nashville R. R. v. Motley*, 219 U. S. 467; [36] also *Gold Clause case*; *Kline v. Burke Construction Co.*, 260 U. S. 226, 234.

Able and persuasive arguments have been submitted by counsel for the respective parties, and by the Attorney General of the United States, who intervened under the Congressional Act of 1937, 28 U. S. C. A. Sec. 401, all of which the court has carefully considered, together with many decisions by other courts throughout the country relating to the questions involved in the present action, and with the result that this court is fully convinced from the arguments of counsel and authorities cited, and from able decisions rendered by other courts embracing like issues, that the motion of defendant's counsel should be granted on both grounds therein set forth, and such is the order of the court herein, with exceptions allowed counsel for plaintiff.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Dec. 19, 1947.

Thereafter, on December 30, 1947, Order dismissing action was duly filed, entered and noted in the civil docket, being in the words and figures following, to wit: [37]

[Title of District Court and Cause.]

ORDER

This action came before the Court upon the suggestion of defendant that pursuant to the "Portal-to-Portal Act of 1947" the Court is without jurisdiction and upon the motion of defendant, in the alternative, that the action be dismissed with prejudice. In support of defendant's motion, the Attorney General has intervened under the Act of 1937 (28 U. S. C. A. Section 401). The Court having heard and considered the arguments of the parties for and against the suggestion of lack of jurisdiction and the motion and having considered the brief filed by the Attorney General following his intervention, and the parties having stipulated that the action does not involve an activity compensable pursuant to an express provision of a written or non-written contract in effect at the time of the activity alleged, nor an activity heretofore compensable by any custom or practice in effect at the establishment or other place where the claimants were employed covering such activity, and the Court being fully advised in the premises, concludes as follows:

1. That pursuant to subsections (a) and (b), Part II, Section 2 of the "Portal-to-Portal Act of 1947," Public Law 49, 80th Congress, the defendant is not subject to liability or punishment or to pay overtime compensation for the activities involved herein.
2. That the activities upon which these claims

in this action are based are not such activities as are compensable under subsections (a) and (b), [38] Part II, Section 2 of the "Portal-to-Portal Act of 1947," Public Law 49, 80th Congress, and therefore this Court, pursuant to subsection (d) of said Section 2, has no jurisdiction to enforce any liability or impose any punishment therefor.

3. That the Court is without jurisdiction to grant the relief prayed for in the complaint.

Wherefore, it is Ordered and Decreed that the above entitled action be and the same is hereby dismissed with prejudice and an exception is hereby allowed to plaintiff.

Dated this December 30th, 1947.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed, entered and noted in the Civil Docket December 30, 1947.

Thereafter, on March 29, 1948, Notice of Appeal was duly filed herein, being in the words and figures following, to wit: [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that A. G. Role, Plaintiff, above named, hereby appeals to the Circuit Court

of Appeals, Ninth Circuit, from the Order of Dismissal entered in this action on the 30th day of December, 1947.

Dated this 26th day of March, 1948.

LEIF ERICKSON,
H. LOWNDES MAURY,
A. G. SHONE,
Attorneys for Appellant.

[Endorsed]: Filed March 29, 1948.

Thereafter, on April 20, 1948, Designation by defendant of additional portions of the records and proceedings to be contained in the record on appeal was duly filed herein, in the words and figures following, to wit: [42]

[Title of District Court and Cause.]

DESIGNATION BY DEFENDANT OF ADDITIONAL PORTIONS OF THE RECORDS AND PROCEEDINGS TO BE CONTAINED IN THE RECORD ON APPEAL

Comes now the defendant, J. Neils Lumber Company, a corporation, and within ten (10) days from the service of the plaintiff's Designation of Record, does hereby designate the following portions of the records and proceedings to be contained in the record on appeal in addition to the matters designated by the plaintiff:

1. Order Permitting Amendment to Complaint by Interlineation.
2. Motion of the United States to Intervene and for Time Within Which to File a Brief in Support of the Constitutionality of the Portal-to-Portal Act of 1947 and the Fair Labor Standards Act of 1938.
3. Order granting the United States Leave to Intervene, contained in a Minute Entry dated October 31, 1947.
4. Pleading of the United States in Intervention.

Please endorse the respective dates of filing of the foregoing proceedings in the above entitled court, and as to the [43] Minute Entry of October 31, 1947, please designate the date thereof.

Dated this 20th day of April, 1948.

C. A. HART,
ART JARDINE,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
By S. B. CHASE, JR.

Of Counsel:

JARDINE, CHASE & STEPHENSON,
Great Falls, Montana.
HART, SPENCER, McCULLOCH &
ROCKWOOD,
Portland, Oregon.

[Endorsed]: Filed April 20, 1948. [44]

Thereafter, on April 27, 1948, Statement of Points was duly filed herein, in the words and figures following, to wit: [45]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which Appellant intends to rely on this appeal are as follows:

1. The Court erred in finding that the defendant is not subject to liability and to pay overtime compensation to the plaintiff and to other workmen similarly situated designated in Schedule "A" attached to the complaint for the activities involved because of the provisions of Subsection (a) and (b), Part II, Section 2 of the "Portal-to-Portal Act of 1947."

2. The Court erred in holding that the activities upon which these claims in this action are based are not such activities as are compensable under Subsection (a) and (b), Part II, Section 2 of the "Portal-to-Portal Act of 1947," Public Law 49, 80th Congress, and, therefore, the Court pursuant to Subsection (d) of said Section 2, has no jurisdiction to enforce any liability or impose any punishment therefor.

3. The Court erred in holding that the Court is without jurisdiction to grant the relief prayed for in the complaint.

4. The Court erred in sustaining defendant's motion for judgment on the pleadings.

5. The Court erred in dismissing the action.

LEIF ERICKSON,
H. L. MAURY,
A. G. SHONE,

[Endorsed]: Filed April 27, 1948. [46]

Thereafter, on April 27, 1948, Designation of Record on appeal was duly filed herein by the appellant, in the words and figures following, to wit:

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Appellant designates the following portions of the record and proceedings to be contained in the record on appeal in this action:

1. Complaint.
2. Stipulation Permitting Amendment of Complaint by Interlineation.
3. Defendant's Answer to Complaint.
4. Defendant's Suggestion of Lack of Jurisdiction and Motion for Judgment on Pleadings.
5. The Opinion of the Court and Order Granting Defendant's Motion.
6. Order of Dismissal.
7. Notice of Appeal.
8. Statement of Points on which Appellant intends to rely.

9. This Designation.

LEIF ERICKSON,

H. L. MAURY,

A. G. SHONE,

Attorneys for Plaintiff.

[Endorsed]: Filed April 27, 1948. [48]

In the District Court of the United States in and
for the District of Montana

United States of America,
District of Montana—ss.

CLERK'S CERTIFICATE TO TRANSCRIPT

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 49 pages, numbered consecutively from 1 to 49, inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 948, A. G. Role, Plaintiff, versus J. Neils Lumber Company, a corporation, Defendant, and United States of America, Intervenor, designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Eleven and 40/100ths (\$11.40) Dollars, and have been paid by the appellant.

Witness my hand and the seal of said Court at Great Falls, Montana, this 4th day of May, A. D. 1948.

[Seal] H. H. WALKER,
Clerk, United States District Court for the District
of Montana.

By /s/ ELIZABETH C. McKEE,
Deputy Clerk.

[Endorsed]: No. 11924. United States Circuit Court of Appeals for the Ninth Circuit. A. G. Role, Appellant, vs. J. Neils Lumber Company, a corporation, and United States of America, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the District of Montana.

Filed May 6, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit

A. G. ROLE,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation, and
THE UNITED STATES OF AMERICA,

Appellees.

Brief of Appellant, A. G. Role

*Upon Appeal from the District Court of the United
States for the District of Montana*

LEIF ERICKSON,

Helena, Montana

H. L. MAURY,

A. G. SHONE

Butte, Montana

Attorneys for Appellant

FILE

AUG 2 1948

PAUL P. O'BRIEN,

CLERK

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United States
Circuit Court of Appeals
For the Ninth Circuit

A. G. ROLE,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation, and
THE UNITED STATES OF AMERICA,

Appellees.

Brief of Appellant, A. G. Role

STATEMENT OF JURISDICTION

Plaintiff brought this action on behalf of himself and others similarly situated against their common employer to recover overtime pay under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Secs. 201-216, a law of the United States regulating interstate commerce and jurisdiction of this action rests in the Federal Courts under the authority of 52 Stat. 1069, 29 U. S. C. A., Sec. 216 (b). The complaint seeks overtime pay under the Fair Labor Standards Act (R. 2, 3, 4, 5, 6, 7, 8). The defendant interposed a suggestion of lack of jurisdiction and Motion for Judgment on the pleadings. Upon this Motion (R. 20-21) final judgment was rendered (R. 26,

27, 28, 29, 30) and an Order was entered dismissing the action with prejudice (R. 31-32). This is a final decision and appeal is allowed under Sec. 225 of Title, 28 U. S. C. A. being Judicial Code, Sec. 128, as amended.

STATEMENT OF CASE

This action was commenced April 10, 1947, to recover overtime pay under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Secs. 201-219. The fact situation as set out by the allegations of the complaint (R. 2-13) is as follows: The defendant is a corporation engaged in logging operations in Montana and in producing lumber products for sale and shipment in interstate commerce. The plaintiff is an employee of the defendant and brings the suit on his own behalf and on behalf of other employees similarly situated. The plaintiff and the other employees similarly situated will hereafter be referred to as the "employees." The employees are engaged in the production of goods for interstate commerce. They allege in their complaint that they were required to work more than forty (40) hours in each work week and that they were not compensated, as required by the Fair Labor Standards Act, for the additional time so worked. That time was time spent in traveling from the headquarters of the defendant corporation at Libby, Montana, to its woods operations in the vicinity of Troy, Montana, and in the vicinity of Warland, Montana. It is alleged that the travel was in conveyances owned and operated by the defendant corporation and over roads built and maintained by the defendant corporation. Additionally, it is alleged that plaintiff and those similarly

situated were not compensated for time spent in handling, carrying, caring for or putting away tools and receiving orders for the conduct of the defendant's business. The complaint alleges that the time in traveling, etc., occurred before and after the regularly scheduled starting and quitting times and that the work set out required the expenditure of mental and physical energy and labor which was essential, necessary for, and required by the character and nature of the work and were pursued necessarily and primarily for the use and benefit of the defendant. No exact sum is sued for, the plaintiff alleging that he has not available the records containing full information as to the exact time worked and that information is in the possession of the defendant. Interrogatories are attached to the complaint designed to bring out that information (R. 8-9).

Defendant filed its Answer on June 9, 1947 (R. 14-19). Thereafter on June 10, 1947, Suggestion of Lack of Jurisdiction and Motion for Judgment on the pleadings was filed by defendant (R. 20-21). This Motion was based upon the enactment of the Portal to Portal Act of 1947 (29 U. S. C. A., 251 et seq.; Pub. Law 49, 80th Congress). The provisions of this Act will be referred to in the Argument. Briefly stated, its provisions seek to do two things, (1) withdraw jurisdiction from all Courts of any action to enforce certain liabilities under the Fair Labor Standards Act and (2) deny recovery to employees who are seeking compensation for or on account of activities, which were not compensable either by an express provision of a written or non-written contract of employ-

ment between defendant and such employees, or by any custom or practice covering such activities in effect between defendant and such employees. After intervention by the United States (R. 23) and after arguments and the submission of Briefs the Court made its decision and entered its Order dismissing the action and entering Judgment for the defendant (R. 31-32). Plaintiff appealed (R. 32).

This appeal raises the questions: (1) Are the rights of employees for overtime compensation under the Fair Labor Standards Act vested rights? (2) May those rights be destroyed by a subsequent act of Congress? (3) Are those portions of the Portal to Portal Act, Sec. 2, Part II, Public Law 49, 80th Congress, purporting to bar actions like this, constitutional?

SPECIFICATIONS OF ERROR

1. The Court erred in finding that the defendant is not subject to liability and to pay overtime compensation to the plaintiff and to other workmen similarly situated designated in Schedule "A" attached to the complaint for the activities involved because of the provisions of Subsection (a) and (b), Part II, Section 2 of the Portal to Portal Act of 1947.

2. The Court erred in holding that the activities upon which these claims in this action are based are not such activities as are compensable under Subsection (a) and (b), Part II, Section 2 of the "Portal to Portal Act of 1947", Public Law 49, 80th Congress, and, therefore, the Court pursuant to Subsection (d) of said Section 2, has

no jurisdiction to enforce any liability or impose any punishment therefor.

3. The Court erred in holding that the Court is without jurisdiction to grant the relief prayed for in the complaint.

4. The Court erred in sustaining defendant's motion for judgment on the pleadings.

5. The Court erred in dismissing the action.

ARGUMENT

The Specifications of Error together present to the Court the question of the constitutionality of Section 2, Part II, of the Portal to Portal Act of 1947, Public Law 49, 80th Congress, 29 U. S. C. A., 251 et seq. As the matter was presented to the District Court the plaintiff admitted that the time spent in traveling in conveyances furnished by the defendant, in part over roads built and maintained by the defendant, had not been compensable historically either by written or non-written contract or by custom as set out in the Portal to Portal Act of 1947. If Section 2 of that Act, which purports to bar existing claims is constitutional, then the decision of the District Court must be affirmed. It is the position of the plaintiff that the claims here involved are vested rights which may not be taken from the employees by subsequent legislation and that the Portal to Portal Act is unconstitutional insofar as it seeks to destroy the existing causes of action by Section 2 (a) which denies recovery where the time was not compensable by contract or custom and by Section 2 (d) which re-

moves jurisdiction of all Courts to hear and adjudicate actions for such compensation. Section 2 of the Portal to Portal Act, Public Law 49, 80th Congress, 29 U. S. C. A., 251 et seq., provides:

**“PARTS II—EXISTING CLAIMS
RELIEF FROM CERTAIN EXISTING CLAIMS
UNDER THE FAIR LABOR STANDARDS ACT
OF 1938, AS AMENDED, THE WALSH-HEA-
LEY ACT, AND THE BACON-DAVIS ACT.**

Sec. 2. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under Subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the

Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b)."

Under the authority of three decisions of the United States Supreme Court the activities upon which this suit is based are labor within the provisions of the Fair Labor Standards Act of 1938, *Anderson v. Mt. Clements Pottery Co.*, 328 U. S. 680; *Tennessee Coal, Iron & R. R. v. Muscoda*, 321 U. S. 590; *Jewell Ridge Coal Corp. v. U. M. W.*, 325 U. S. 161.

In a decision from the District Court of Montana, Judge Brown presiding, rendered August 24, 1946, it was held that travel time in conveyances furnished by the employer, under facts almost identical to those alleged in the complaint in this case, was labor under the Fair Labor Standards Act. *Walling v. Anaconda Copper Mining Company*, 66 Fed. Sup. 913.

From these decisions it is clear that absent the Portal to Portal Act of 1947, Public Law 49, 80th Congress, this complaint states a cause of action and its dismissal would have been error. This brief then will be devoted to a consideration of whether these claims are vested rights and whether by retroactive legislation these rights, if they are vested, may be destroyed.

**A CAUSE OF ACTION FOR OVERTIME COMPENSA-
TION UNDER THE FAIR LABOR STANDARDS
ACT IS A VESTED RIGHT.**

There can be no question but that purely statutory privileges, penalties and forfeitures may be destroyed by subsequent retroactive legislation.

Examples of cases falling within this statement include *Pearsall v. Great Northern R. R. Co.*, 161 U. S. 646, 40 L. ed. 838, where the statute giving a right to the railroad company to consolidate with other lines was repealed prior to the attempted consolidation. The right was executory and the Court held the destruction of the right to be valid. In *Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.*, 258 U. S. 13, 66 L. ed. 437, it was held that an inchoate right to maintain an action or secure a benefit for which no consideration had been given could be avoided by legislation enacted while the suit was pending.

Norris v. Crocker, 13 How. 429, held there was no vested right to the collection of a statutory penalty. To the same effect see *Maryland v. Baltimore & Ohio R. R. Co.*, 3 How. Pr. 534, 11 L. ed. 714.

The Court in *Re Hall*, 167 U. S. 38, 42 L. ed. 69, held there was no vested right in a governmental gratuity. A number of cases have held that informer statutes create no vested rights. *Confiscation Cases*, 74 U. S. 454.

Modification of a remedy is valid even though operating retroactively so long as the entire remedy is not destroyed. *Gibbs v. Zimmerman*, 290 U. S. 326, 78 L. ed. 342; *Home Building and Loan Assoc. v. Blaisdell*, 290 U. S. 398,

78 L. ed. 413; *Ex Parte McCardle*, 7 Wall. 506, 19 L. ed. 264; *Norman v. Baltimore and Ohio R. R. Co.*, 294 U. S. 240, 79 L. ed. 885.

Statutes have been upheld which have the effect of legalizing previously unlawful transactions. In *Ewall v. Daggs*, 108 U. S. 143, it was held that a contract originally illegal because usurious could be cured by subsequent legislation. The court sustained a statute in effect validating a contract, which at its inception, was illegal because it was for less than the published rate of the carrier involved in *National Carload Corp. v. Phoenix-El Paso Express*, 176 S. W. (2) 564. Cert. denied 322 U. S. 747, 88 L. ed. 1578.

The rationale behind all of these decisions is that there was no right which had vested. It is our position that the right to overtime compensation under the fair labor standards is a vested right and the right may not be destroyed or substantially impaired on the authority of the cases set out above.

The nature of the right to recover overtime pay under the Fair Labor Standards Act of 1938 has been explored and defined in several decisions. The decisions uniformly hold that the claim for overtime wages, for liquidated damages and for attorneys' fees is not based upon a statutory penalty or a bare statute given right, but upon contract.

In *Walling v. McKay*, 70 Fed. Sup. 160, 169, the Court said:

"Furthermore, the obligation imposed by the Fair Labor Standards Act and the provisions embodied

therein must be read into and treated as being a part of every contract of employment to which the Act applies."

The Supreme Court of the United States in *Overnight Motor Transport Co., Inc., v. Missel*, 316 U. S. 572, 583, held:

"The liquidated damages for failure to pay the minimum wages under Sections 6(a) and 7(a) are compensation, not a penalty or punishment by the government. (Citing cases) The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. (Citing cases.)"

This decision was cited with approval in the recent case of *Brooklyn Bank v. O'Neill*, 324 U. S. 697, 707.

In the case of *Northwestern Yeast Company v. Broutin*, 133 Fed. (2d) 628, 630, Circuit Ct. of Appeals of the 6th Circuit, the Court was considering the validity of an attachment in a suit for overtime wages under an Ohio statute which permits attachments in suits for labor performed "under a contract of employment". Defendant's position was that the claim was for penalty. The Court said:

"* * * we think that this claim clearly arises upon contract. The recovery authorized by Sec. 16 (b) of the Fair Labor Standards Act does not constitute a penalty, but is considered compensation. (citing *Overnight Motor Transport Co.*, and others.) The Federal statute is premised upon the existence of an employment contract. * * * Thus here the claim for overtime compensation is founded upon and is co-existent with the contract. The action for double

compensation may be considered as debt or an action for wages due under the employment agreement. (Citing cases.)”

“* * * the statutory obligation contained in the Fair Labor Standards Act is read into and becomes a part of every employment contract between an employer and employee subject to the terms of the Act. The liability is for the wages due employees under working agreements which the federal statutes require employer and employee to make.”

To the same effect is *Hays v. Bank of America, California*, 162 P. (2d) 679, where a similar attachment statute was involved. The Court said:

“Clearly the provision of the Act (Fair Labor Standards Act) for overtime wages is for compensation for services and not penal in nature.”

Citing *Overnight Motor Transport Co., Inc., v. Missel*, *supra*, and *Brooklyn Bank v. O'Neill*, *supra*.

In *Gangi v. Schulte*, 328 U. S. 108, the Supreme Court in speaking of the recovery allowed under the Act said that “the damages are at the same time compensatory, and an aid to enforcement.”

The Court in *Republic Pictures v. Kappler*, 151 Fed. (2d) 543, held “The action for overtime under the statute is an action on Contract.” To the same effect is the holding in *Reid v. Solar Corporation*, (D. C. Iowa) 69 Fed. Supp. 626.

Since the claims arise under the contract of employment which incorporate within themselves the provisions of the

Act, cases which hold that legislative action can retrospectively cut off purely statutory rights and penalties have no application.

A case similar in many respects to the ones here under consideration is *Pacific Mail Steamship Co. v. Jolliffe*, 17 L. Ed. 805, 807. By an act of California, ship owners who refused the proffered tender of a pilot's service were required to pay to the pilot half the usual fee. The plaintiff action under the Act. While the action was pending the Act was repealed. In discussing the case, the Court said:

"His (the attorney general's) position is, that as the claim to half pilotage fees was given by the statute, the right to recover the same fell with repeal of the statute; and that this court must dismiss the writ of error on that ground.

"The claim to half pilotage fees, it is true, was given by the statute, but only in consideration of services tendered. * * * If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. The transaction in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract.

"The claim of the plaintiff below for half pilotage fee, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. *When a right has arisen upon a contract, or a transaction in the*

nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

THE CLAIM FOR OVERTIME COMPENSATION, NOT BEING A PURELY STATUTORY RIGHT, IS VESTED AND UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION THE CONGRESS MAY NOT TAKE THE RIGHT AWAY BY RETROACTIVE LEGISLATION.

The Fifth Amendment provides in part: "No person * * * shall be * * * deprived of life, liberty or property, without due process of law." It is our contention that in Part II of the Portal to Portal Act of 1948, Public Law 49 of the 80th Congress does seek to take from its citizens their property without due process of law.

Chief Justice Marshall in the leading case of *Marbury v. Madison*, 1 Cranch 137, said, "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested rights."

In *Osborne v. Nicholson*, 80 U. S. 654, 662, 20 L. Ed. 689, the Court considered a statute providing that no trans-

action with regard to slavery should be valid. A slave was sold and delivered while the institution of slavery was legal. Suit to recover the purchase price was brought after the enactment of the statute being considered. In holding the subsequent legislation did not defeat the right of recovery the Court said:

“Rights acquired by a deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils.”

It has been almost uniformly held that a person cannot be divested of previously vested rights. *Coombs v. Getz*, 285 U. S. 434; *Ettor v. Tacoma*, 228 U. S. 148, 156; *Pritchard v. Norton*, 106 U. S. 124; *Hawthorne v. Calef*, 2 Wall. 10; *Steamship Co. v. Jolliffe*, 17 L. Ed. 807; *Ochiltree v. Railroad*, 21 Wall. 249, 252-253; *Treigle v. Acme Homestead Association*, 297 U. S. 189; *Lynch v. United States*, 292 U. S. 571, 585; *Duke Power Co. v. South Carolina Tax Commission*, 81 F. (2d) 513; *National Surety Corporation v. Wunderlich*, (C. C. A. 8), 111 F. (2d) 622; *Badger v. Hoidale*, (C. C. A. 8), 88 F. (2d) 208; *Harrison v. Remington Paper Co.*, 140 F. 385, 390; *Knickerbocker Trust Co. v. Myers*, 133 F. 764, 767.

Ettor Case. The State of Washington by statute required municipalities to compensate property holders for

damages resulting from street grading. While these actions were being heard this statute was repealed. The district court took the position that the right of action was statutory and fell with the statute. The Supreme Court reversed, holding:

“The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common law action for a breach of the statutory obligation.

“The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. *This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation.*” (Emphasis added.)

Hawthorne Case. A state statute provided that shares of stockholders would be liable for the debts of the corporation. A creditor sued a stockholder although the in-

dividual liability provision had been repealed two months after the debt was contracted. The Supreme Court reversed the state court and held that by virtue of the statute the stockholders "agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability"; and that the repealing act impaired the obligation of the contract.

Joliffe Case. California provided by statute that when a pilot went out and offered his services to a vessel and the service was declined, the pilot was entitled to one-half pilotage fees. Pending recovery on a suit for one-half pilotage fees, a new statute was passed repealing the terms of the old. It was claimed that recovery could not be had because the right was statutory and could be taken away. The Supreme Court disagreed with this defense, holding instead:

"The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. *When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.* And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then per-

fect, and the liability of the master or owner of the vessel had become fixed." (Emphasis added.)

Coombs v. Getz. This case involved the contract clause of the Federal Constitution. One section of the California Constitution provided that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. While creditors who contracted with the corporation were suing a director to enforce their rights, the section making the director liable was repealed. The Court in permitting the creditor to recover despite the repealing statute reviews the entire problem of vested versus statutory rights. It said:

"The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. *It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future; but it did not, and could not, destroy or impair the previously vested right of the creditor (which in every sense was a property right. Ettor v. Tacoma, supra; Pritchard v. Norton, supra), to enforce his cause of action upon the contract."* *Ettor v. Tacoma, supra; Hawthorne v. Calef, supra; Steamship Co. v. Joliffe, supra; Ochiltree v. Railroad Co., supra; Harrison v. Remington Paper Co., supra; Knickerbocker Trust Co. v. Myers, supra.*

In applying the general rule to the facts in this case, the Court in *Coombs v. Getz* held:

“Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of suretyship. *Harrison v. Remington Paper Co.*, supra, p. 388. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (*Ettor v. Tacoma*, and cases cited in connection therewith, supra) that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, Section 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution.” (Emphasis added.)

National Surety Corp. v. Wunderlich. A statutory provision permitting creditors (for labor, supplies, etc.) of contractors to sue surety within 60 days of settlement was held on the authority of *Coombs v. Goetz* to be a part of the contract so that a subsequent statute repealing this provision and substituting a one-year statute of limitations was not given retroactive effect where the 60 day period had elapsed prior to repeal and the suit was brought after repeal but within the new one-year provision. The Court

conceded that the liability was contractual and not statutory.

Badger v. Hoidale. The Eighth Circuit Court of Appeals as in the National Surety Corp. case, following the authority of *Coombs v. Goetz*, held that stockholder's liability to creditors remained after repeal of the constitutional provision upon which the claim was based. The result was reached on the basis of the Court's opinion that because the liability antedated the repeal and was contractual, it could not be impaired retroactively.

In *Forbes Pioneer Boat Line v. Everglades Drainage District*, 258 U. S. 338, 66 L. Ed. 647, a suit was brought for repayment of tolls collected for passage through a canal in the face of a statutory prohibition against such collection. On the day of the decision in that suit the legislature passed an act purporting to validate those tolls and to destroy the plaintiff's cause of action. Mr. Justice Holmes, for the Supreme Court, held the legislative enactment was unconstitutional and the boat line could not be deprived of its right to recover the overcharge. In doing so he said:

"Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money which was due when the act was passed.

"Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force should be at plaintiff's disposal is less absolute than it is

when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation."

The last sentence from the quotation above applies with equal force to the facts in the present case. The Congress in the Portal to Portal Act of 1947, said that claims for overtime pay shall be barred because of their adverse effect upon interstate commerce. If the Congress could do this within the Fifth Amendment why could it not enact a statute which would bar retrospectively recovery for goods sold in interstate commerce? Obviously under the Forbes decision it could not do that. How can it logically be argued that the protection of the Fifth Amendment does not extend as well to claims for the recovery of compensation for work and labor performed? Under the decisions cited heretofore in this brief time spent in travel in company owned conveyances under company control is just as much work and labor as is the time spent by an employee swinging an ax in the woods. If constitutionally the claim for overtime can be barred would it not equally be true that the Congress could by retrospective legislation deny recovery to employees for the time spent in falling trees?

There is no basis for distinguishing what Congress has attempted to do here from the legislative action held unconstitutional in the case we have above considered. It is true that these cases deal with enactments of the various states but there can be no question but that the principles which apply to state actions under the Fourteenth Amendment are applicable also to Federal Acts under the Fifth

Amendment. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 50 L. Ed. 246; *Nebbia v. New York*, 291 U. S. 502, 78 L. Ed. 940; *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. Ed. 1490; *Fed. Power Commission v. Natural Gas Co.*, 315 U. S. 575, 86 L. Ed. 1037.

The Portal to Portal Act was passed under the broad powers of the Congress to regulate interstate commerce. That power, like all other power of the sovereignty, is limited by the Constitution of the United States. Chief Justice Marshall in *Gibbons v. Ogden*, 22 U. S. 1, 6 L. Ed. 23, had this to say:

“This power (to regulate commerce) like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and *acknowledges no limitation other than are prescribed in the Constitution.*”

This language is quoted time after time in subsequent decisions.

The limitation on the power of Congress under the Interstate Commerce Clause is more specifically stated in *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 347, 79 L. Ed. 1468:

“All agree that the pertinent provision of the Constitution is Article I, Sec. 8, Clause 3, which confers power on the Congress ‘To regulate commerce . . . among the several States . . .’; and that *this power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment.*”

The Supreme Court, many times, has said that all of the great substantive powers granted to Congress in the Constitution are subject to the Fifth Amendment. *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 336, 13 S. Ct. 622, 37 L. Ed. 463; *U. S. v. Joint Traffic Ass'n.*, 171 U. S. 505, 571, 19 S. Ct. 25, 43 L. Ed. 259; *Lottery Case*, 188 U. S. 321, 362; *Carroll v. Greenwich Ins. Co. of New York*, *supra*, 199 U. S. 401, 410, 26 S. Ct. 66, 50 L. Ed. 246; *U. S. v. Chicago M. St. P. & P. R. Co.*, 282 U. S. 311, 51 S. Ct. 159, 75 L. Ed. 359; *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 589, 55 S. Ct. 854, 79 L. Ed. 1593; *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va.*, 300 U. S. 440, 456, 57 S. Ct. 556, 81 L. Ed. 736; *North American Co. v. S. E. C.*, 327 U. S. 686, 705, 66 S. Ct. 785, 90 L. Ed.

To summarize this portion of the argument of plaintiff the claim for overtime compensation under the Fair Labor Standards Act is quasi-contractual. It is not for a penalty nor is it purely statutory. At the time of the enactment of the Portal to Portal Act of 1947 the rights of the plaintiff and those here represented to the compensation had accrued, a cause of action was in existence. A cause of action which has accrued is a vested right and constitutes property in the same sense in which tangible things are property and is protected by the provisions of the Constitution as much as any other property rights. *Ettor v. City of Tacoma*, 228 U. S. 148, 57 L. Ed. 773. The facts in this case are strikingly similar to those in *Steamship Company v. Joliffe*, *supra*, 69 U. S. 450, 17 L. Ed. 805. The power of Congress over interstate commerce is limited by

the constitutional inhibitions as are all of the great powers given to that body. We sincerely urge that the Portal to Portal Act of 1947 constitutes the taking of property without due process of law under the contemplation of the Fifth Amendment to the Constitution of the United States and for that reason Part II of the Act is unconstitutional.

**WE BELIEVE THE PORTAL TO PORTAL ACT OF 1947
IS UNCONSTITUTIONAL FOR THE FURTHER REASON
THAT IT REPRESENTS AN INVASION OF THE
JUDICIAL PREROGATIVE BY THE LEGISLATURE**

By the language contained in Section 1 (a) of Part II of the Portal to Portal Act, it is clear that the Congress is attempting to re-define working time and by so doing to over-rule the decisions of the Courts in *Anderson v. Mt. Clements Pottery*, supra, and other cases. That it could do this for the future there can be no doubt but when the attempt is to re-define working time for retrospective application then the Congress is invading the province of the judiciary. Article III of the Constitution in Section 1 provides:

"The judicial power of the United States shall be vested in one Supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."

Re-defining working time for retrospective application is clearly an exercise of the judicial power. That power may be exercised only by the judiciary. The language of Article III is plain, clear and unmistakable. The Court will not be burdened with many authorities to establish

that what the Congress here tries to do is a judicial act. A reference to Cooley's Constitutional Limitations, 8th Ed., Vol. I, Page 179, et seq., should be sufficient to demonstrate that aside from all other considerations this Act must fall because of the basic principle upon which our government is built, i.e., that one of the co-ordinate branches of government may not infringe upon the prerogatives, powers and duties of another.

To quote a few excerpts from that eminent authority:

"I entertain no doubt 'says Comstock J.,' that aside from the special limitations of the Constitution, the legislature cannot exercise powers which are in their nature essentially judicial."

The work then goes on to distinguish between legislative and judicial functions at page 183:

"The legislative power we understand to be the authority under the Constitution to make laws and to alter and repeal them. * * * And it is said that that which distinguishes a judicial from a legislative act is that the one is a *determination of what the existing law is in relation to some existing thing already done or happened*, while the other is a pre-determination of what the law shall be for the regulation of all *future* cases falling under its provisions. (Citing *Bates v. Kimball*, 2 Chip. 77.)

"And in another case it is said 'the legislative power extends only to the making of laws and in its exercise it is limited and restrained by the permanent authority of the Federal and State Constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or trans-

fer to another without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government and is forbidden to the legislative. (Citing *Newland v. Marsh*, 12 Ill. 383.)”

And further, the author says:

“* * * to compare the claims of parties with the law of the land before established, * * * is in its nature a judicial act. But * * * to pass new rules for the regulation of new controversies * * * is in its nature a legislative act; * * *.”

In *Prentiss v. Coast Line Co.*, 211 U. S. 210, the Supreme Court said:

“A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed to already exist. That is its purpose and end.”

The Supreme Court of Iowa in *McSurely v. McGraw*, 140 Iowa 160, 118 N. W. 415, aptly said:

“After action is brought it is certainly beyond the power of the legislature to declare the action is void and the Court in which it is pending without jurisdiction. Such matters are purely judicial and not legislative and under our three departments of government it is inadvisable for one to assume the powers, duties, or responsibilities of the other.”

Applying these tests to Chapter 49, can there be any doubt but that the Congress is here attempting to exercise a purely judicial function when it seeks by Section 2 of the Act to void existing claims and to interpret the pro-

visions of an existing law as applied to claims in existence at the time the act was passed?

Here the action was pending before the passage of the Portal to Portal Act of 1947. The complaint stated a cause of action under the law as it then stood. The determination of whether the proof would support the complaint was purely a judicial function. Whether the travel time was work and labor was a matter entirely for judicial determination. The cause of action had accrued. Nothing remained to be done to perfect it. The Portal to Portal Act of 1947 attempts to oust the judiciary from an exercise of its inherent powers and the portion of the Act which operates retrospectively, clearly violates the provisions of Article III of the Constitution of the United States.

SECTION 2 (d), PART II OF THE PORTAL TO PORTAL ACT DENIES JURISDICTION TO ANY COURT OF SUITS TO RECOVER OVERTIME UNDER FACTS LIKE THOSE HERE ALLEGED AND IS UNCONSTITUTIONAL IN THAT IT TAKES PROPERTY WITHOUT DUE PROCESS OF LAW.

Section 2 (d), Part II, of the Portal to Portal Act provides:

“(d) No court of the United States, of any State, Territory or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair

Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

To be doubly sure that it had destroyed the claims of working men for overtime compensation for travel time the Congress included Section 2 (d) in Part II, apparently under the assumption that the Courts might strike down their attempt to destroy the claims by the direct action of Section 2 (a), (b), (c) and (e) but that under their inherent power to regulate jurisdiction they could destroy these rights by the indirect method of denying to the claimants their day in court. The protection of the Fifth Amendment and of the other provisions of the Constitution would be weak, indeed, if substantive rights could be taken from the people by any such device. The purpose of the Congress plainly apparent on the face of the Act was to use withdrawal of jurisdiction as a means of striking down pending actions for overtime pay. It did not take the jurisdiction from some Courts and leave it with others. It did not transfer jurisdiction from a Court to an agency in the nature of a judicial tribunal. It did not take the jurisdiction from Federal Courts and give it to State Courts. Under the guise of exercising its authority over the jurisdiction of inferior Federal Courts it seeks to destroy constitutionally-protected private rights by removing every possible means for their judicial enforcement.

In *Lynch v. U. S.*, 292 U. S. 571, 78 L. Ed. 1434, Mr. Justice Brandeis said:

“Contracts between individuals or corporations are impaired within the meaning of the Constitution *whenever the right to enforce them by a legal process is taken away* or materially lessened.”

The Supreme Court said in *Bronson v. Kinsey*, 42 U. S. 311, 11 L. Ed. 143:

“Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract, itself. In either case it is prohibited by the Constitution. * * * And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it.”

In *Graham v. Goodcell*, 282 U. S. 409, 75 L. Ed. 415, it is said:

“If the Congress did not have the authority to deal by a curative statute with the taxpayers’ asserted, substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong.”

As we have already said, all the great, substantive powers of Congress are subject to the Fifth Amendment, *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. Ed. 1593, and many cases heretofore cited, and certainly this rule applies to the exercise by Congress of its substantive power in the regulation of the jurisdiction of Courts. Other cases dealing with the question are *General Investment Co. v. New York Central R. R. Co.*, 271 U. S. 228, 70 L. Ed. 920; *Wheeler v. Jackson*, 137 U. S. 245, 35 L. Ed. 659; *Gibbes v. Zimmerman*, 390 U. S., 78 L. Ed. 342; *Home Building & Loan Ass'n. v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413; *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U. S. 124, 81 L. Ed. 552; *Godshaux Co. v. Estopinal*, 146 La. 405, 83 So. 690; *Puterbaugh v. Gila County*, 45 Ariz. 57, 46 Pac. (2d) 1064.

It seems clear on general principles and from the above cited cases that this constitutional enactment which attempts to destroy the rights of these employees by the indirect method of denying to any court jurisdiction to hear their claims amounts to the taking of their property without due process of law.

CONCLUSION

We respectfully submit that under the decisions the claim to overtime embodied in this action is based upon a contract of employment. *Pacific Mail Steamship Co. v. Jolliffe*, 17 L. Ed. 805; *Walling v. McKay*, Fed. Supp. 160; *Overnight Motor Transport Co. v. Missel*, 316 U. S. 572, and other cases heretofore cited. The cause of action

is a vested right protected by the Fifth Amendment to the Constitution of the United States and comes within the numerous decisions cited in this brief. *Ettor v. Tacoma*, 228 U. S. 148; *Coombs v. Getz*, 285 U. S. 434, and many others. The power to regulate interstate commerce, great as it is, is subject to the limitations of the Fifth Amendment. *Railroad Retirement Board v. Alton R. R. Co.*, 295 U. S. 330, and other cases cited. Vested rights may not be destroyed in the exercise of the power to regulate interstate commerce.

We further submit that the Portal to Portal Act of 1947 represents an attempt on the part of the legislative branch of government to exercise the functions of another co-ordinate branch, the judicial. This under the Constitution it cannot do. *Cooley's Constitutional Limitations*, supra. And finally the attempt to deny jurisdiction of actions like the present one to any court is a taking of property without due or any process of law. *Lynch v. U. S.*, 292 U. S. 571, and other cases heretofore cited.

We submit the judgment of the Lower Court should be reversed with directions to deny the motion to dismiss the action.

Respectfully submitted,

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United States Circuit Court of Appeals

For the Ninth Circuit

A. G. ROLE,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation, and

THE UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLEE J. NEILS LUMBER COMPANY

Upon Appeal from the District Court of the
United States for the District of Montana

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United States Circuit Court of Appeals

For the Ninth Circuit

A. G. ROLE,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation, and
THE UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLEE J. NEILS LUMBER COMPANY

Upon Appeal from the District Court of the
United States for the District of Montana

STATEMENT OF THE CASE

Appellee J. Neils Lumber Company accepts appellant's Statement of the Case and of the questions to be heard and decided by this Court. Appellee does not agree, however, with appellant's statement (Appellant's Brief p. 8) that the activities upon which the suit is based were compensable work under the rule

of the *Mt. Clemens*, *Tennessee* and *Jewell Ridge* cases.* Appellee's answer alleged, and its evidence would undertake to establish, that the activities were not compensable work under the statute as interpreted in the three cases referred to.

ARGUMENT

The single question presented by this appeal is whether Section 2 of the Portal-to-Portal Act of 1947, 29 U.S.C.A. 251 et seq., is constitutional. Appellant challenges the constitutionality of this statute, as applied to the rights of action pleaded, because these rights of action are, as appellant contends, vested rights which appellant asserts are beyond the power of Congress to destroy.

Appellee J. Neils Lumber Company challenges both the premise and the conclusion of this argument. The rights of action pleaded were created by statute and were subject to change or repeal by statute; and if upon any theory they could be classified as vested rights, Congress had power to impair or destroy them because they conflicted with a national policy deemed necessary in the public interest.

* *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680;
Tennessee Coal, Iron & R. R. Co. v. Muscoda, 321 U.S. 590;
Jewell Ridge Coal Corp. v. U. M. W., 325 U.S. 161.

Up to the time of the preparation of this brief three Circuit Courts of Appeal and many District Courts have sustained the constitutionality of Section 2 of the Portal-to-Portal Act for either or both of the reasons just stated.* We shall cite and quote from several of these decisions in the argument to follow.

I.

*The rights upon which the action is based
were of statutory creation and were not
vested or property rights.*

The demand of the complaint is for wages, with overtime and penalties, for activities which appellant claims constituted work under the provisions of the Fair Labor Standards Act. 29 U.S.C.A. Section 201-219. The pleadings, supplemented by the stipulation

*Seese v. Bethlehem Steel Co., 168 F. (2d) 58;
Battaglia v. General Motors Corp., 8 W. H. Cases p. 108
(decided July 3, 1948) ;
Fisch v. General Motors Corp., 15 Labor Cases, 74, 129
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Miller et al. v. Howe Sound Mining Corp., 77 F. Supp. 540;
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Ackerman v. J. I. Case Co., 74 F. Supp. 639, 644;
Burfeind v. Eagle-Picher Co. of Texas, 71 F. Supp. 929;
Cochran v. St. Paul & Tacoma Lumber Co., 73 F. Supp. 288;
Lasater v. Hercules Powder Co., 73 F. Supp. 264;
Reid v. Day & Zimmerman, Inc., 73 F. Supp. 892;
Hornbeck v. Dain Mfg. Co., 7 W. H. Cases p. 296;
Hart v. Aluminum Company of America, 73 F. Supp. 727.

recited in the order of the Court below (R. 31), establish that these activities were not compensable work under the provisions of the contract of employment. If they are in fact compensable, they became so only because of the enactment of the statute which enlarged the contractual obligation voluntarily assumed by the employer. They are contract rights only in the sense that they accrue to individuals who have entered into employment contracts subject to the statute. The statute and not the employment contract is the foundation of the right.

The Circuit Courts of Appeal and the District Courts which have thus far passed upon this question have almost uniformly held that wage and overtime rights which were enforceable only because of the provisions of the Fair Labor Standards Act were not vested or property rights. The most recent decision is that of the Circuit Court of Appeals for the Sixth Circuit in *Fisch v. General Motors Corp.* (decided August 2, 1948), 15 Labor Cases, 74,129. The Court there said:

“Plaintiffs contend that their causes of action are founded upon rights vested in them and protected by the due process clause of the Fifth Amendment, which cannot be disturbed. We think plaintiffs’

rights were not 'vested rights' in the sense contended.

* * *

"The plaintiffs' causes of action are not founded altogether simply upon contract executed by the free consent and agreement of the parties thereto. The contracts were based upon subject matter in respect to which Congress had authority to legislate; and did not establish fixed rights of either present or future enjoyment. They were regulated by the Fair Labor Standards Act as construed in *Tenn. Coal Co. v. Muscoda Local*, 321 U.S. 590 (8 Labor Cases 51, 175); *Jewell Ridge Corp. v. Local*, 325 U.S. 161 (9 Labor Cases 51, 201), and especially by the *Mount Clemens* decision. Plaintiffs could not expect that their status or rights would remain unchanged through changing circumstances and conditions. They could reasonably anticipate changes in the law. The proposition that their rights granted by the Congress under the commerce clause could not be taken away by congressional legislation under the same clause, is self-contradictory."

In *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58, the Circuit Court of Appeals for the Fourth Circuit stated as its first reason for sustaining the constitutionality of the Portal-to-Portal Act that "even rights arising out of contract cannot fetter Congress in the exercise of a power granted it by the Constitution;"

but, the Court added "the rights stricken down by the statute are not rights arising out of the contract at all, but rights created by statute as an incident of the statutory regulation of commerce." 168 F. (2d) 62.

In *Sadler v. W. S. Dickey Clay Mfg. Co.*, 73 F. Supp. 690, the District Court for the Western District of Missouri stated its reasons for this conclusion as follows:

"The rights here asserted by plaintiffs are not vested property rights. They are rights accruing by virtue of a statute enacted by Congress. True, the federal statute which permits such recovery 'is bottomed upon a contract of employment,' (*Republic Pictures Corp. v. Kappler* (8th Cir.) 151 F. 2d 543, 546 (5 WH Cases 680)), but, regardless of the provisions of such employment contract, the right of recovery here asserted by plaintiffs is traceable to the provisions of the Fair Labor Standards Act of 1938, and not to any contract provision plaintiffs have with defendant. Under such circumstances, the cause of action here asserted for overtime compensation is a statutory cause of action. The plaintiffs have no property right to the benefits of the Fair Labor Standards Act of 1938, 'except under and by virtue of the statutes securing it to (them), and according to the regulations and restrictions of those statutes.' *Dablo Grain Shovel Co. v. Fling*, 137 U.S. 41, 43."

In *Seese et al. v. Bethlehem Steel Co.*, 74 F. Supp. 412, 419, the District Court for the District of Maryland, in passing upon this question, said:

“If it had thought wise to do so, Congress could have repealed the Fair Labor Standards Act in toto and if the repealing Act provided that it should apply to all existing claims or cases under the Act repealed and did not contain a saving clause with respect to them, it is not apparent why it would have been invalid as to them.”

* * *

“I therefore conclude that the rights now asserted by the plaintiffs under the Fair Labor Standards Act were not vested rights protected by the 5th Amendment because only of statutory origin which could be and have been constitutionally taken away by the Portal-to-Portal Act.”

Other District Court decisions holding that wage and overtime rights enforceable because of the provisions of the Fair Labor Standards Act are statutory rights and not vested rights within the protection of the Fifth Amendment are:

Ackerman v. J. I. Case Co., 74 F. Supp. 639;

Burfeind v. Eagle-Picher Co. of Texas, 71 F. Supp. 929;

Cochran v. St. Paul & Tacoma Lumber Co.,
73 F. Supp. 288;

Darr v. Mutual Life Ins. Co. of New York,
72 F. Supp. 752;

Lasater v. Hercules Powder Co., 73 F. Supp. 264;

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Hart v. Aluminum Company of America,
73 F. Supp. 727.

Court decisions upholding what are said to be vested rights determine that upon the facts shown in each case, the right asserted was a vested right beyond the power of Congress to alter or abrogate. The term is not defined and no rule of general application is evolved. The resulting uncertainty as to what is and what is not a vested right makes this a very unsatisfactory test of the constitutionality of retroactive legislation. One writer on this subject, after noting the confusion in the cases, said:*

“If the term ‘vested’ means anything at all, some of these laws certainly take away vested rights and yet such laws have been sustained. It is submitted that the distinction between vested and non-vested rights, like that between rights and remedies, or between jurisdictional and non-jurisdictional defects in legal proceedings, is of use primarily as a

*Selected Essays on Constitutional Law, published under auspices of Association of American Law Schools, Vol. 2, pp. 279-280.

basis on which to classify decisions after they have already been reached on other grounds. Nor is it always applied consistently even to this use. . . . The distinction is of little use to determine the fate of a given law. If it is not a paradox to say so, a vested right is not necessarily immune to the power of retroactive legislation.”

There are decisions both ways upon the question whether the wage and overtime obligation imposed upon employers by the Fair Labor Standards Act becomes a contract obligation under certain state statutes applicable to remedies. The prevailing view seems to be that although the liability under the Act is that of a contractual nature, it arises solely by virtue of the statute and is therefore to be classified as a liability created by statute.

Lorenzetti v. America Trust Co., 45 F. Supp. 128;

Smith v. Cudahy Packing Co., 73 F. Supp. 141;

Abram v. San Joaquin Cotton Oil Co., 45 F. Supp. 969;

McDuffie v. Hayes Freight Lines, Inc., 71 F. Supp. 755;

Drenne v. Mutual Life Ins. Co., 42 N.Y. Supp. (2d) 259;

Walsh v. 515 Madison Avenue Corp., 42 N.Y. Supp. (2d) 262, aff'd 293 N.Y. 826, 59 N.E. (2d) 183;

Asselta v. 149 Madison Avenue Corp., 65 F. Supp. 385, aff'd 156 F. (2d) 139, cert. den. 329 U.S. 764;

Cannon v. Miller, 22 Wash. (2d) 227, 155 P. (2d) 500.

The cases taking the opposite view, including two cited by appellant,* hold that wage and overtime claims under the Act are rights "arising upon contract", within the meaning of limitation and probate statutes. These cases do not determine that wage and overtime claims under the Act are vested rights. At most, they hold that the claims are not tort claims but are within the category of contract claims under the provisions of attachment and probate statutes, notwithstanding the fact that they were created by an Act of Congress.

Similarly the characterization of the statutory overtime wages as compensation and not a penalty, in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583, does not reach the question here involved. The Court held in the *Overnight* case that the damages collectible for failure to pay the statutory minimum wages were compensation to the em-

**Northwestern Yeast Co. v. Broutin*, 133 F. (2d) 628;
Hays v. Bank of America, 162 P. (2d) 679.

ployee and not a penalty or punishment by the Government. The statutory provision was characterized as remedial and not penal, but the remedy prescribed — the additional compensation to the employee — is statutory in its origin, and there is nothing in the decision to suggest that it can be classified as anything but a statutory remedy.

In the later case of *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, the Court made it quite clear that the overtime and damage right created by the Fair Labor Standards Act is a statutory and not a contractual right. Characterizing it as a statutory right specifically, the Court said that it was a right conferred on a private party but affecting the public interest; and the Court held that employees could not waive or compromise their claims for what was due them under the Act. The Act is available to them because they are employees. But the rights granted are not contract rights subject to their control; they are statutory rights, enforceable only as authorized and directed by the statute.

Appellant's chief support for its "vested right" contention is *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. 450. In its discussion of the questions involved in that case, the Court said that the State of California could

not invalidate rights of action which had accrued under an earlier statute imposing liability for pilots' fees on shipowners under certain circumstances. This liability was said to be quasi-contractual and the accrued right of action was characterized as a "vested" right. But this was not the question that controlled the disposition of the case. The Court examined the later California enactment and held that the legislature did not intend to impair or affect rights which had accrued under the earlier statute.

The *Joliffe* case was decided in 1865 by a divided court. Since that time no case has held that quasi-contractual rights — that is, rights added by statute to those created by obligations voluntarily assumed — have the same legal status and become vested rights upon their accrual; nor has the Supreme Court in any later case so characterized them. On the contrary, the Court has many times held that rights created by statute fall with the repeal of the statute; and where that is the statutory intent, accrued rights also become unenforcible. This rule was applied in *Flanigan v. Sierra County*, 196 U.S. 553, where the Court specifically rejected the contention that the right created by the earlier statute was contractual in nature and that rights which had accrued under it had therefore become vested. The Court said (196 U.S. 560):

“The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, sec. 165. And it follows that no proceeding can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon’s Abridgement, 226.”

Appellant’s claims, according to the findings of Congress (in Section 1 of the Act under consideration) are based upon “wholly unexpected liabilities” under which employees would receive “windfall payments . . . for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay.” Appellee Neils Company’s answer pleads that no work or service was required of or accepted from its employees during the travel time involved; the employment excluded the travel time from the work period.

The rights asserted by appellant were derived from the Fair Labor Standards Act as interpreted by the Supreme Court. They were not vested rights beyond the power of Congress to alter or repeal.

II.

Accrued contract rights may be altered or made unenforcible by federal legislation when in conflict with a national policy determined upon by Congress in the execution of its powers under the Constitution.

Appellant's argument that Congress lacks power in any circumstances to abrogate vested rights pointedly ignores the Gold Clause case* and other decisions of the Supreme Court upholding this power when exercised as a necessary incident to changes in national policy, in the regulation of interstate commerce, or in any other field placed in the control of Congress by the Constitution. Nearly all of the recent cases which have upheld Section 2 of the Portal-to-Portal Act (referred to earlier in this brief, ante p. 3) invoke and apply the rule of these decisions of the Supreme Court. Appellant's brief makes no attempt to explain why they are not controlling here.

In the Gold Clause case, the Court sustained the power of Congress to make unenforcible contract obligations to pay indebtedness in gold coin. Other instances of legislation which was sustained regardless of the fact that accrued contract rights were impaired are the anti-pass law provisions of the Interstate Com-

*Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240.

merce Act (*Louisville & Nashville R. R. Co. v. Mottley*, 219 U.S. 467), the Employers' Liability Act of 1908 (*Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U.S. 603) and the Railroad Reorganization Amendments to the Bankruptcy Act (*Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648). The anti-pass law nullified contracts providing for free railroad transportation for extended periods, often for life, in consideration of the release of personal injury or other claims. Similarly the Employers' Liability Act made unenforcible contracts under which acceptance of benefits provided by a relief plan operated as a release of damage claims. Section 77 of the Bankruptcy Act authorized changes in the contract rights of security holders pursuant to a reorganization plan accepted by a specified majority of each class of security holders.

In the decision of the Gold Clause case, the Court restated the reasons controlling its decision in the *Schubert* case (involving the Employers' Liability Act) as follows (294 U.S. 310):

“The power of Congress, in regulating interstate commerce, was not fettered by the necessity of maintaining existing arrangements and stipulations

which would conflict with the execution of its policy. . . . To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by 'prophetic discernment' to bring within the range of their agreements. The Constitution recognizes no such limitation."

The power of Congress to impair or destroy accrued contract rights found to be in conflict with a necessary change in national policy was specifically upheld in the Railroad Reorganization case, where the Court said (294 U.S. 680):

"Speaking generally, it may be said that Congress, while without power to impair the obligations of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts."

In the three cases in other Circuits which have upheld the Act under review here, the power of Congress to abrogate contract rights in the circumstances shown was not doubted. *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58; *Battaglia v. General Motors*

Corp., 8 W.H. Cases, p. 108; *Fisch v. General Motors Corp.*, 15 Labor Cases, 74,129. In the *Seese* case the Court said (168 F. (2d) 62):

“The Portal-to-Portal Act of May 14, 1947, like the Fair Labor Standards Act which it modified and amended, was an exercise by Congress of the power to regulate interstate and foreign commerce; and it is well settled that the exercise of such power is not invalidated even by the fact that its effect is to destroy rights under valid existing contracts. Such was the holding in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136, where the court pointed out that private contracts as well as state legislation must yield in such case to the superior power of Congress. Such was the holding in *Louisville & N. R. Co. v. Mottley*, 219 U.S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L.R.A., N.S., 671, where an act of Congress was held to strike down a contract made in settlement of a personal injury case. And such was the holding in the case of *Norman v. Baltimore & O. R. Co.*, 294 U.S. 240, 55 S. Ct. 407, 79 L. Ed. 885, 95 A.L.R. 1352, where congress in the exercise of the power to coin money and regulate its value struck down the ‘gold clauses’ of private contracts.”

Similarly, in the *Battaglia* case, the Court said (8 W. H. Cases, p. 112):

“The Portal-to-Portal Act, like the Fair Labor Standards Act, was passed as an exercise of the

power to regulate commerce from time to time as conditions may require. The Congressional findings, made after investigations which disclosed amply supporting facts, show fully why the enactment of the Portal-to-Portal Act was necessary to avoid great injury to interstate commerce. In the Act Congress saw fit to change the Fair Labor Standards Act, which might be said previously to have made the appellants' contracts of employment include the right to compensation for portal to portal activities, by doing away with so much of those contracts in that respect as that statute had added to them. This did not deprive the appellants of any Constitutional right. If the contractual arrangements of these private parties were subject to the Fair Labor Standards Act as it might be interpreted by the courts, or were modified to take into consideration decisions construing that statute, they were also subject to changes made in it by Congress in the exercise of its power to regulate commerce."

Statutory rights which have accrued and which are in the process of enforcement in pending litigation are of course no more sacred than contract rights. If such statutory rights can be classed as "vested" rights, and of course there is the gravest doubt of this in the case of the rights here involved, they must give way to what has been found necessary by Congress in the public interest. Impairment of existing rights is "a necessary effect of any considerable change in the

public laws.” *Louisville & Nashville R. R. Co. v. Mottley*, 219 U.S. 467, 485.

It can hardly be denied that the Portal-to-Portal Act effected a change in the national policy in a matter of great public concern. Enforcement of the overtime provisions of the Fair Labor Standards Act, as interpreted by the Supreme Court, threatened serious consequences to the economy of the country, and a change in the policy attributed to that statute was imperative.

It was not enough to change the rule for the future. Indeed, by far the greater threat to industry and to the Public Treasury as well lay in the enforcement of accrued claims upon which suit had been brought following the Supreme Court's decisions in the mine cases and in the Mt. Clemens Pottery case. In this situation it became necessary to declare that such liabilities had not been anticipated in the enactment of the Fair Labor Standards Act and to provide that they shall not be enforceable.

The “Findings and Policy” stated in Part I of the Act concludes that a substantial burden had been imposed on commerce with a resulting “substantial obstruction to the free flow of goods in commerce.” The

reasons given for this conclusion relate almost entirely to accrued liabilities which were "wholly unexpected" and which were "immense in amount and retroactive in operation." Evidence presented to the Congressional committees had pointed out that there had been no opportunity to anticipate or to avoid these accrued liabilities. Men had been employed the full forty hours in each week upon the assumption then prevailing that preliminary and postliminary activities were not generally part of the compensable work; hence all the time expended in these activities became unpaid overtime for which the statutory penalty could be exacted. Of this situation the findings (Section 1 of the Act) say:

"... if said Act as so interpreted or claims arising under such interpretations were permitted to stand (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of

competitive conditions between employers and between industries; (4) employees would receive wind-fall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur."

These findings amply sustain the conclusion that the national interest required a change in existing laws as interpreted by the Supreme Court, and that in the

emergency which existed the change must include a prohibition against the enforcement of accrued “portal-to-portal” claims. There is a parallel to these findings and to the conclusion drawn from them in the recitals of the Joint Resolution of Congress with respect to the “gold clauses” of private contracts for the payment of money. The second of the two recitals has the following language (294 U.S. 291, note 2):

“Whereas the existing emergency has disclosed that the provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, . . .”

The Supreme Court upheld the power of Congress to nullify “gold clause” obligations because such contract rights were subordinate to the constitutional authority of Congress over the currency of the United States. In the decision the Court noted that Congress similarly had power to abrogate contracts when that became necessary in the regulation of commerce between the states. The Court said (294 U.S. 308), quoting from *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 229-230:

“Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.”

It is clear, therefore, that there are no private rights, vested or otherwise, which are completely beyond the power of Congress to alter or even to nullify in the exercise of its broad constitutional authority over such subjects as interstate commerce.

CONCLUSION

The rights sought to be asserted here were not vested rights. They were rights to specific statutory remedies which could be withdrawn at any time by the power that created them. But if upon any theory these asserted rights can be classed as “vested” rights, Congress had power to abrogate them when it found them in conflict with a change in national policy deemed necessary in the regulation of interstate commerce.

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No. 11924

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

A. G. ROLE, APPELLANT

v.

J. NEILS LUMBER COMPANY, A CORPORATION, APPELLEE

THE UNITED STATES OF AMERICA, INTERVENOR

**UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MONTANA**

BRIEF OF THE UNITED STATES AS INTERVENOR

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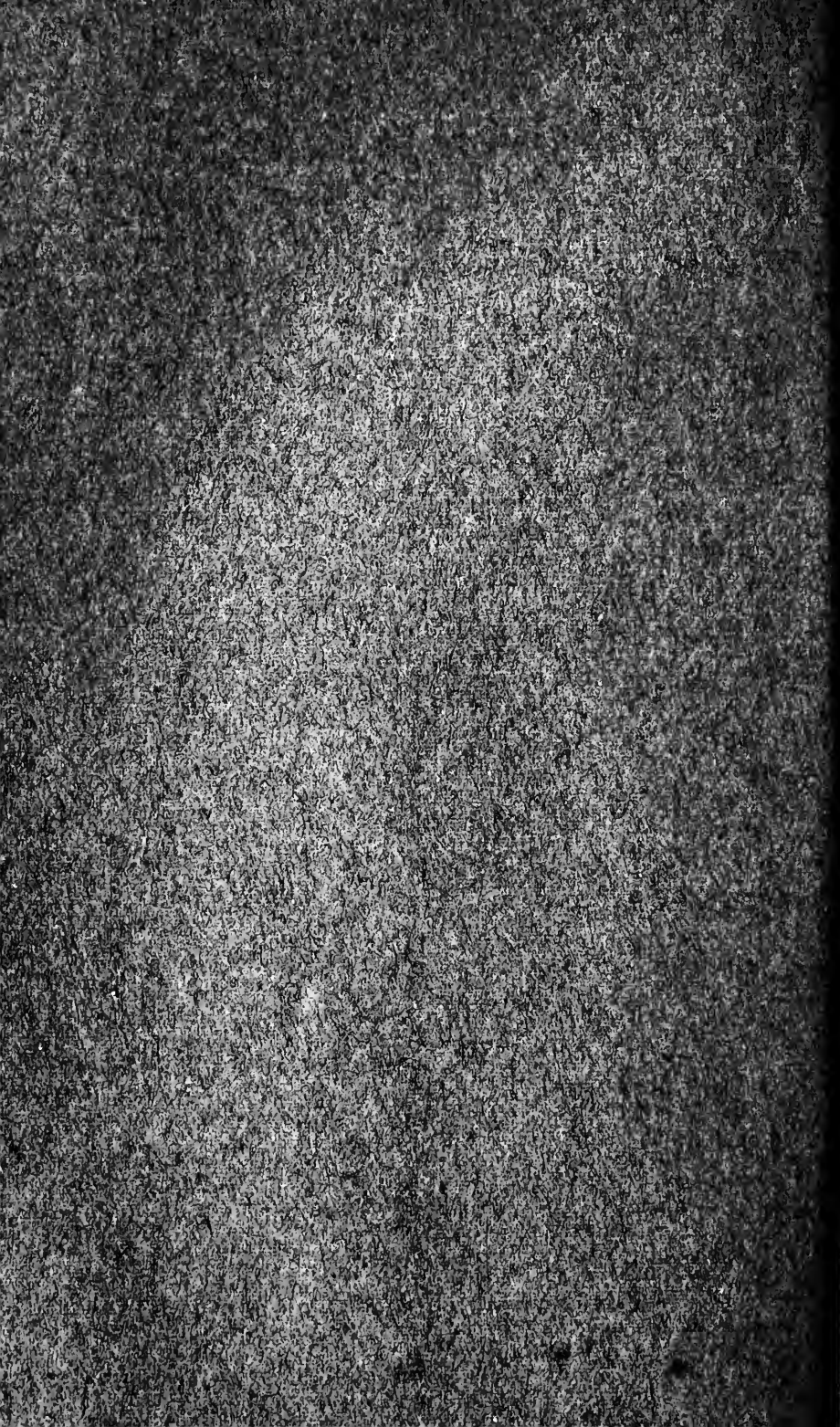
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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

11924

A. G. ROLE, APPELLANT

v.

J. NEILS LUMBER COMPANY, A CORPORATION, APPELLEE

THE UNITED STATES OF AMERICA, INTERVENOR

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MONTANA*

BRIEF OF THE UNITED STATES AS INTERVENOR

STATEMENT

(a) Jurisdiction

Appellant, on behalf of himself and other present and former employees of Appellee, instituted this action in the District Court of the United States for the District of Montana, to recover overtime compensation under the Fair Labor Standards Act of 1938 (R. 2-3), based upon time spent by them in walking

and in preliminary and other activities on the premises of Appellee both before and after the regularly scheduled work periods (R. 4-6).

The jurisdiction of the District Court was invoked under Section 41 (8) of Title 28 of the United States Code, which authorizes the District Courts to hear and determine causes arising under laws regulating commerce, as well as under Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b). The grant of jurisdiction to this Court to entertain the appeal is lodged in the provisions of Section 128(a) of the Judicial Code, as amended, 28 U.S.C. § 225(a).

Upon the enactment of the Portal-to-Portal Act of 1947, Appellee invoked the provisions of that Act as defenses to Appellant's claims (R. 14, 18-21), and in opposition thereto Appellant, among other things, questioned the constitutionality of that Act. After the hearing, the District Court sustained the constitutionality of the Portal Act on December 19, 1947 (R. 26-30), and the action was dismissed on December 30, 1947 (R. 31-32).

This appeal was thereupon entered by Appellant (R. 32-33).

Pursuant to the Act of August 24, 1937, c. 754, § 1, 50 Stat. 751, 28 U. S. C. § 401, the United States has intervened in support of the constitutionality of the Portal Act (R. 22-25). In view of the limited nature of the intervention, the Government in this case, as in others, takes no position as to any issues relating to the factual applicability of the Act beyond discussing the meaning of its sections to the extent deemed relevant to the constitutional questions.

While this brief deals primarily with the arguments that have been advanced by Appellant in this case, it is not confined to such arguments but covers as well all respectable related arguments which have thus far come to our attention in connection with litigation involving attacks upon the constitutionality of the Portal Act throughout the country. Accordingly, a mere reference to a contention that the Act is unconstitutional will not necessarily imply that the present Appellant has advanced or relies upon it.

(b) The statutes involved

Pertinent excerpts from the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Ch. 52, 61 Stat. 84, 29 U. S. C. § 251-262) and the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; as amended, 29 U. S. C., § 201-219) appear at appropriate points in the brief, *infra*.

(c) Summary of legislative history of the Portal-to-Portal Act of 1947

On June 10, 1946, the Supreme Court, in the case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, decided that employees covered by the Fair Labor Standards Act of 1938 were, under Section 7 (a) of that Act (29 U. S. C., § 207 (a)), entitled, in the computation of their statutory work week for overtime compensation purposes, to have included as working time the minimum time necessarily spent by them on their employer's premises walking from time clocks to places of productive work and time spent in certain preliminary activities, such as putting on aprons and overalls and preparing equipment for productive work,

provided they were thus “required to give up a substantial measure of” their “time and effort” (*id.* 692). In so deciding, it reversed the decision of the United States Circuit Court of Appeals for the Sixth Circuit (149 F. 2d 461) and ordered remand of the case to the District Court of the United States for the Eastern District of Michigan “for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the *de minimis* doctrine and calculating the resulting damages under the Act” (328 U. S. at 694).

Following the decision of the *Mt. Clemens* case numerous suits seeking very substantial sums, purporting to rest on the decision, were filed throughout the country.¹ These actions, which created a potential liability for billions of dollars in so-called portal-to-portal claims on the part of employers, had the unfortunate effect of impairing their credit, interfering with collective bargaining with employees, and retarding re-conversion to peacetime production.² Accordingly, the 80th Congress which convened in January 1947 gave the “portal-to-portal” problem early attention. Various bills were introduced in both houses and were referred to the committees on the judiciary where ex-

¹ As of January 31, 1947, the Administrative Office of the United States courts reported that 1515 cases had been filed in which the aggregate claims totaled \$5,785,204,606, not counting 398 cases in which the amounts of the claims were not stated. (Senate Rept. No. 48, Part 1, p. 2, to accompany H. R. 2157, 80th Cong., 1st Sess.).

² The Portal-to-Portal Act of 1947, Part I, Sec. 1 (Act of May 14, 1947, Public Law 49, 80th Cong., Ch. 52, 1st Sess.). The President's Message Transmitting His Approval of H. R. 2157, The Portal-to-Portal Act of 1947 (H. Doc. No. 247, 80th Cong., 1st Sess.)

tensive hearings were held. During this period the District Court for the Eastern District of Michigan, which had been considering the *Mt. Clemens* case on the order of remand, dismissed the action upon the ground, among others, that all compensable activities involved were, because of the short intervals of time devoted to them, subject to the *de minimis* doctrine enunciated by the Supreme Court (69 F. Supp. 710). On February 25, 1947, the Gwynne bill (H. R. 2157) was reported favorably to the House of Representatives (Rept. No. 71). On February 28, 1947, the House passed the measure by a vote of 345 to 56 (93 Cong. Rec. 1630). The Senate Judiciary Committee, which theretofore had been considering Senate bills on the same subject, promptly took up the House bill and on March 10, 1947, reported it favorably, with amendments (Rept. No. 48). The Senate, on March 21, 1947, passed the bill by a vote of 64 to 24 (93 Cong. Rec. 2453).

Thereafter, the bill was submitted to a conference committee for the purpose of resolving the differences between the two houses. This committee had the bill under advisement for a full month. During this time the employees in the *Mt. Clemens* case noted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. On March 20, 1947, the United States, which had intervened in the case, petitioned the Supreme Court for a writ of certiorari (No. 1143, Oct. Term, 1946), requesting review of the decision prior to its consideration by the Circuit Court of Appeals. On April 8, 1947, the Circuit Court of Appeals dismissed the appeal on the motion of the employees (162

F. (2d) 200). Accordingly, the petition for certiorari was dismissed on the Government's motion on April 14, 1947 (331 U. S. 784). On April 29, 1947, the conference report was submitted to the Senate and the House (93 Cong. Rec. 4334; 4368) and was adopted by a voice vote in the Senate and by a vote of 173 to 27 in the House. The measure was approved by the President on May 14, 1947, and such action was announced to the Congress by a special message from the President (H. Doc. No. 247, 80th Cong., 1st Sess.).³

Throughout the legislative consideration of the "portal-to-portal" problem, the constitutionality of the proposed legislation was given serious and thorough consideration.⁴

(d) Court decisions under the Portal-to-Portal Act of 1947

The constitutionality of the Act has been upheld by three United States Circuit Courts of Appeals⁵ and by more than a hundred decisions of Federal District

³ According to the figures reported by the Administrative Office of the United States Courts, 267 portal-pay suits had already been terminated by the end of the 1947 fiscal year on June 30, 1947, or about six weeks after the passage of the Portal-to-Portal Act of 1947. Of this number, 233 were dismissed prior to trial with the consent of or at the request of the parties. 1947 WH 1632.

⁴ See, e. g., H. Rept. No. 71, 80th Cong., 1st Sess., p. 6; S. Rept. No. 48, 80th Cong., 1st Sess., p. 43; 93 Cong. Rec. 2193, 2194; H. Doc. No. 247, *supra*, p. 2.

⁵ *Rogers Cartage Co. v. Reynolds* (6 Cir.), 166 F. 2d 317; *Seese v. Bethlehem Steel Co.* (4 Cir.), 168 F. (2d) 58; *Battaglia v. General Motors Corp.* (2 Cir., decided July 8, 1948), 8 WH cases 108, 15 Labor Cases, par. 64,619; *Darr v. Mutual Life Insurance Co. of New York* (2 Cir., decided July 8, 1948), 8 WH Cases 124, 15 Labor Cases, par. 64,620; *Fisch v. General Motors Corporation* (6 Cir., decided August 2, 1948), 8 WH Cases 207, 15 Labor Cases, par. 64,674.

Courts.⁶ With possibly two exceptions,⁷ we are aware of no decisions to the contrary. Although the Supreme Court of the United States has had occasion to remand two cases for reconsideration because of the enactment of the statute,⁸ no petition for certiorari involving the constitutionality of the Act has yet been filed.

ARGUMENT

1. The findings and policy of the Congress set forth in Section I of the Portal-to-Portal Act of 1947 are proper and binding upon the courts. The Act does not constitute an unconstitutional usurpation of judicial power

In most of the briefs attacking the constitutionality of the Portal-to-Portal Act of 1947, which have come to our attention in connection with litigation throughout the country,⁹ it has been suggested, in one way or another, that the announcement of the findings and policy by the Congress, in Section I of the Act, was improper and either that the findings could not be considered as lending constitutional validity to other portions of the Act or that, taken together with other portions of the Act, such findings rendered the Act unconstitutional as an usurpation of judicial power.¹⁰

⁶ The reported District Court decisions are listed in the Appendix, *infra*.

⁷ *Sveltik v. Vultee Aircraft Corp.* (D. C., N. Tex.), 7 WH Cases 282, 13 Labor Cases, par. 64,063; *Curtis v. McWilliams Dredging Co.* (N. Y. City Ct.), 14 Labor Cases, par. 64,352; 7 WH Cases 757.

⁸ *Alaska Juneau Gold Mining Co. v. Robertson*, 331 U. S. 793; *Madison Ave. Corp. v. Asselta*, 331 U. S. 795.

⁹ See Appellant's brief, pp. 24-27.

¹⁰ In respect of Section 1, the argument appears to attack the Congressional findings on the ground of lack of legislative power under the separation of power doctrine. (See *e. g.*, *Kilbourn v. Thompson*, 103 U. S. 168, 190-191; *Marbury v. Madison*, 1 Cranch 137, 177-178; *B. & O. R. R. Co. v. United States*, 298 U. S. 349, 365.) The argument relative to alleged interference with the performance by the courts of their judicial function, is discussed in connection with Section 2 of the Act, *infra*.

At the outset it should be noted that the Fair Labor Standards Act of 1938, as originally enacted, contained, in Section 2, a statement of Congressional findings and policy, as follows:

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in competition in commerce; (3) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (4) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Without disturbing the Congressional findings and policy of the Fair Labor Standards Act of 1938, the Congress, in Section 1 of the Portal-to-Portal Act of 1947, included a statement of additional findings and policy as follows:

(a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-

established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial conditions of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of reve-

nues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost of the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost to war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare essential to national defense and necessary to aid, protect, and foster

commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

These findings were made after exhaustive hearings had been conducted by the committees on the judiciary of both houses of Congress. Representatives of numerous industries and labor organizations appeared and were heard. If it were proper for the Court to review such findings under the rules governing review of judicial findings, all of them would be found to have substantial support in the transcripts of the hearings.

It cannot seriously be contended that the inclusion of a statement of findings and policy in an act of Congress is improper or violative of the Constitution, in and of itself. The practice of including them is of long standing and, as above indicated, indeed was followed in the enactment of the Fair Labor Standards Act of 1938, upon which the "portal-to-portal" claims are based. Such findings and statements of policy are of great assistance to the administrative officers and the courts in the administration and application of such statutes. Cf. *Opp. Cotton Mills v. Administrator*, 312 U. S. 126, 144; *United States v. Darby*, 312 U. S. 100, 109.

With reference to the determinations of the Congress which were recited in the legislation abrogating

claims based upon gold clauses in private bonds, the Supreme Court, in *Norman v. Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 311, 312-313, said:

* * * That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisalment of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final. *McCulloch v. Maryland*, *supra*, pp. 421, 423; *Juilliard v. Greenman*, *supra*, p. 450; *Stafford v. Wallace*, 258 U. S. 495, 521; *Everard's Breweries v. Day*, 265 U. S. 545, 559, 562.

* * * * *

And the Joint Resolution itself recites the determination of the Congress in these words:

“Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all

times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts.”

Can we say that this determination is so destitute of basis that the interdiction of the gold clauses must be deemed to be without any reasonable relation to the monetary policy adopted by the Congress?

The Congress in the exercise of its discretion was entitled to consider the volume of obligations with gold clauses, as that fact, as the report of the House Committee observed, obviously had a bearing upon the question whether their existence constituted a substantial obstruction to the congressional policy.

* * *

Contentions have been advanced to the effect that the finding that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities immense in amount and retroactive in operation, taken together with Section 2 of the Act, which relieves employers of liability for past “portal-to-portal” claims, in effect constitutes an attempted “judicial” decision of the Congress overruling the decision of the Supreme Court in the *Mt. Clemens Pottery* case. Of course, this is neither theoretically nor actually true. There is no suggestion in the Court’s opinion in that case that the decision was based in any way upon customs, practices, or contracts (because none were involved), or that the liabilities created by the Fair Labor Standards Act,

thus construed, were expected by employers, or that, in practical effect, the announcement of such liabilities would not operate in the same manner as if the liabilities had been created by the decision. Arguments to the effect that, at least after the decisions in *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, and *Jewell Ridge Corp. v. Local 325* U. S. 161, employers generally should have expected and prepared for the decision in the *Mt. Clemens* case fall far short of refuting the legislative finding that they did not actually do so. See and cf. *Anderson v. Mt. Clemens Pottery Co.* (D. C., E. D., Mich., February 8, 1947), 69 F. Supp. 710, 712, 719-721.

Whatever may have been the opinions of the individual members of the Congress concerning the correctness of the decisions in the *Mt. Clemens* case, the validity of the Act must be tested by its operative provisions rather than by supposed motives read from between the lines. Cf. *Pope v. United States*, 323 U. S. 1, 3, 9. By its actual effect rather than by the language employed. *Stockdale v. Atlantic Insurance Co.*, 20 Wall. 323, 22 L. Ed. 348, 351.

With reference to this subject, the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in *Seese v. Bethlehem Steel Company*, 168 F. (2d) 58, written by Circuit Judge Parker, is in part as follows:

Plaintiffs contend, however, that the provisions of the statute just quoted are violative of the Constitution (1) in that they represent the exercise by Congress of judicial power and (2) in that they deprive plaintiffs of vested rights under

existing contracts in violation of the due process clause of the Fifth Amendment. We think that both contentions are entirely without merit.

The first contention requires but brief notice. It is true that the effect of the act is to take away rights held by the courts to arise under a statute as they have interpreted it, but this is done, not by the exercise of judicial but of legislative power. When the Fair Labor Standards Act was interpreted by the Supreme Court as requiring computation in the work week of time consumed in walking to work and other preliminary activities, this was just as though the original act contained express provision to that effect; and, when Congress passed the sections of the statute here under consideration, the effect was to repeal the original statute to the extent of that coverage and deny to the federal courts jurisdiction to entertain a suit based thereon. This does not in any manner affect adjudications already made, nor does it attempt to direct the courts in the exercise of judicial power. All that it does is to define rights, i. e., to amend or limit the effect of a prior statute so as to take away a cause of action given by it. *Ackerman v. J. I. Case Co.*, 74 F. Supp. 639; *Hollingsworth v. Federal Mining & Smelting Co.*, 74 F. Supp. 1009; note 49 Harvard Law Review 137, 140. Even where an act is declaratory in form as well as retroactive, it will be upheld ordinarily in those cases where retroactive legislation is permissible. *Graham & Foster v. Goodcell*, 282 U. S. 409, *Stockdale v. Insurance Companies*, 20 Wall. 323.

In other words, the Congress legislated with reference to an existing state of affairs and the Act had

prospective rather than retrospective operation. It cut off certain existing statutory claims which, while based upon past legislation and past activities, were none the less existing claims at the time the Act was passed.

Apparently the mere fact, that the Supreme Court had in the *Mt. Clemens Pottery* case declared, subject to the “*de minimis*” doctrine, that “portal-to-portal” activities were compensable, is relied upon, *sub silentio*, as having the effect of converting otherwise valid legislation into an usurpation of judicial power. Here, again, the Gold Clause case is in point. There, as here, the claims in question had been sustained by the courts (*e. g.*, *Gregory v. Morris*, 96 U. S. 619), and although based upon contracts rather than a statute, unquestionably such claims would have continued to be valid and enforceable in the absence of the legislation. Obviously, legislation designed to alter the consequences of prior legislation cannot be considered more of an infringement of the judicial function than legislation abrogating contractual obligation. Accordingly, the decision of the Supreme Court sustaining the Congressional abrogation of gold clauses should be dispositive of the point. *Norman v. Baltimore & Ohio R. R. Co.*, *supra*.

Accordingly, it is submitted, the Congressional findings and declaration of policy set forth in Section 1 of the Portal-to-Portal Act of 1947 are constitutionally valid in all respects.

2. Section two of the Act constitutionally relieves employers of liability on existing portal-to-portal claims

Part II of the Portal-to-Portal Act of 1947 deals with existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act. Section 2 of the Act is, in relevant part, as follows:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable un-

der such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsection (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

It will be observed that Congress does not attempt in any way to interfere with the enforcement of claims other than those sought to be asserted *under* its prior legislation. Its provision is that "no employer shall be subject to any liability * * * *under* the Fair Labor Standards Act of 1938, as amended" (italics supplied). Therefore, any claim which can be as-

serted independently of the prior legislation is, to that extent, not affected by the Act. Moreover, claims based upon activities which were compensable under express provisions of written or unwritten contracts, or by custom or practice, continue to be enforceable *under* the Act. Accordingly, there can be no merit to any contention that Section 2 of the Portal-to-Portal Act is unconstitutional because the claims that it purports to bar are contract claims.

In other words, if any "portal-to-portal" claim rests sufficiently upon contract that it may be enforced independently of the Fair Labor Standards Act, its enforcement in that manner is in no way barred by the Portal-to-Portal Act. However, it is clear that employers are relieved of liability on "portal-to-portal" claims which rest upon the prior legislation, and that employees' rights to enforce such claims have been revoked, unless the Congress, for some reason, lacked constitutional power to withdraw the support of the earlier legislation.

(a) Congress had plenary power to terminate the purely statutory rights conferred by the Fair Labor Standards Act

As indicated above, by the Portal-to-Portal Act, the Congress has not sought to disturb any claim to any extent that it does not rest exclusively upon its prior legislation, in the sense that it would be valid apart from such legislation. The Congress has found that the Fair Labor Standards Act has been interpreted so as to create "wholly unexpected liabilities" under which employees would receive "windfall payments * * * for activities performed by them without any expectation of reward beyond that included in

their agreed rates of pay.” These are claims that the Congress obviously intended to reach and to bar by the Act. As to employees such benefits were purely statutory¹¹ and can be likened to statutory gratuities. As to employers such unexpected liabilities can be likened to statutory penalties.¹²

Of course, the Congress may terminate statutory gratuities and penalties at any time. The mere repeal of a statute providing for penalties, without a saving clause, terminates prior liability thereunder. *Norris v. Crocker*, 13 How. 429, 440. See also, *United States v. Chambers*, 291 U. S. 217, 222-226 (and authorities there cited). And, in absence of contractual obligation, statutory gratuities may be withdrawn at any time at the will of the Congress. See and *cf.* *Norris v. Crocker*, *supra*; *Lynch v. United States*, 292 U. S. 571, 577 (and cases there cited).

¹¹ See, *e. g.*, *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, 602-603; *Jewell Ridge Corporation v. United Mine Workers*, 325 U. S. 161, 167; *Brooklyn Bank v. O'Neil*, 324 U. S. 697, 704.

¹² The civil liabilities to employees imposed by the Fair Labor Standards Act upon “Any employer who violates” its provisions (29 U. S. C. § 216 (b)) had two distinct, if integrated, purposes, *i. e.*, (1) to enforce its provisions relative to minimum wages and maximum hours (*id.* §§ 206 & 207) and (2) to provide for the payment of fair compensation to employees. Accordingly, while the benefits conferred upon employees are personal to them, they are nonetheless enforcement provisions of the Act which could not be contracted away. See and *cf.*, *e. g.*, *Overnight Motor Co. v. Missel*, 316 U. S. 572; *Brooklyn Bank v. O'Neil*, 324 U. S. 697. Inasmuch as the “portal-to-portal” benefits of the Act came as a “windfall” to employees, they may be regarded as pure statutory benefits subject to the further exercise of the legislative power that brought them into being—and, in respect of the enforcement aspects of the liabilities thus imposed upon employers, they obviously have all the attributes which make penalties equally subject to the legislative will.

As stated by the Supreme Court in the case of *Flanigan v. Sierra County*, 196 U. S. 553, 560:

The general rule is that powers derived wholly from a statute are extinguished by its repeal. *Sutherland on Statutory Construction*, § 165. And it follows that no proceeding can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act, 9 *Bacon's Abridgement*, 226.

Accordingly it is clear that rights arising from and depending upon legislation alone may be terminated at the will of the legislative body.¹³ For this reason the United States Circuit Court of Appeals for the Sixth Circuit found Sections 9 and 11 of the Portal-to-Portal Act to be constitutional in *Rogers Cartage Co. v. Reynolds*, 166 F. (2d) 317, saying:

Sections 9 and 11 of the Portal-to-Portal Act are constitutional. Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co. v. Securities & Exchange Commission*, 327 U. S. 686, 703; *American Power & Light Co. v. Securities & Exchange Commission*, 329 U. S. 90. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United

¹³ See and cf. *Western Union Telegraph Co. v. Louisville & Nashville Ry.*, 258 U. S. 13, 19-22; *McNair v. Knott*, 302 U. S. 369, 372-374 (and cases there cited); *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 311-312, 314-316; *Louisiana v. Mayor*, 109 U. S. 285, 287-288; *In re Hall*, 167 U. S. 38, 42; *Cummings v. Deutsche Bank*, 300 U. S. 115, 124; *National Carloading Corp. v. Phoenix-El Paso Express*, 176 S. W. (2d) 564, 569-570, cert. den. 322 U. S. 747.

States Constitution. Since they are purely the creature of Statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. Cf. *Western Union Telegraph Co. v. Louisville & Nashville Ry. Co.*, 258 U. S. 13; *Kline v. Burke*, 260 U. S. 226, 234. The constitutionality of the Act has been recently considered in various District Courts, and invariably upheld. Cf. *Boehle v. Electric Metallurgical Co.*, 72 Fed. Supp. 21.

For the same reason the Circuit Courts of Appeals for the Second and Fourth Circuits held that Section 2 is clearly constitutional. *Seese v. Bethlehem Steel Co.* (4 Cir.), 168 F. (2d) 58; *Battaglia v. General Motors Corp.* (2 Cir. decided July 8, 1948), 8 WH Cases 108, 15 Labor Cases, par. 64,619. In so ruling in the *Seese* case, the Court, among other things, said:

What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce. *Missel v. Overnight Transportation Co.*, 316 U. S. 572; *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697. Even where the contract clause is a limitation upon legislative power, it is universally held that such a claim may be taken away by the legislature without violation of constitutional right. Since the legislature may repeal its own act, it may take away that which has no existence save by virtue of that act. *Norris v. Crocker*, 13 How. 429; *Ewell v. Daggs*, 108 U. S. 143, 151; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; *A. C. L. R. Co.*

v. *Goldsboro*, 232 U. S. 548; *West Side R. Co. v. Pittsburgh Const. Co.*, 219 U. S. 92; *National Carloading Corp. v. Phoenix-El Paso Express*, *supra*. The reason underlying the rule was stated by Mr. Justice Matthews in *Ewell v. Daggs*, *supra*, as follows:

“And these decisions rest upon solid ground.
* * * The more general and deeper principle on which they are to be supported, is that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract.”

Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act; and the authority of the legislative body to validate voluntary transactions which at the time they were entered into were by statute invalid or illegal has been repeatedly upheld. *West Side R. Co. v. Pittsburgh Const Co.*, 219 U. S. 92; *McNair v. Knott*, 302 U. S. 369, 372. In other words, the contracts of employment which contemplated that no payment should be made for the portal-to-portal activities but that these were to be compensated by the agreed wage,

were invalid only because of the provisions of the Fair Labor Standards Act. There was nothing in law or in reason which forbade Congress to give validity to these contracts retroactively, just as the invalid pledge of securities by National Banking Associations was validated by retroactive legislation in the case of *McNair v. Knott*, *supra*.

Plaintiffs rely upon such cases as *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ettor v. City of Tacoma*, 228 U. S. 148; *Coombes v. Getz*, 285 U.S. 434; and *Duke Power Co. v. South Carolina Tax Com'n*, 4 Cir. 81 F. 2d 513; but these cases are not in point. They were concerned with vested property rights based on agreements and not on mere statutory provisions without contract or agreement to support them. * * *

Among the cases thus distinguished are those upon which chief reliance is placed by the appellant (brief, pp. 15-23.¹⁴ The Court further said:

There is nothing in the result accomplished by the statute upon which it can be condemned as an unreasonable exercise of the commerce power by Congress. As a matter of fact, all that it does is prevent employees reaping an unexpected wind-fall from an unexpected court decision. In another

¹⁴ In the *Ettor* case, for example, the existence of the statute reasonably tended to assure the property owner that he would be reimbursed for damage so that his failure to take protective measures, in reliance thereon, constituted a change of position in a contractual sense. (Cf. discussion of these cases in *McLaughlin v. Todd & Brown, Inc.*, D. C. Ind., 7 WH Cases 1014.) Here, however the right to "portal-to-portal" pay was wholly of statutory creation, was not given in substitution for either a contract or property right which otherwise would have been received or would have continued to exist, and "this is not a case where appellants conduct would have been different if the present rule had been foreseen" (*Chase Securities Corp. v. Donaldson*, *supra*; 316).

situation where parties were about to be enriched by unexpected profits resulting from another decision, Congress passed the "windfall" tax act of 1936 (Revenue Act of 1936, Title III, sec. 501 (a), 26 USCA 345 (a) (1)), taking 80% of the windfall for the government by way of retroactive taxation. We held the tax valid in *White Packing Co. v. Robertson*, 4 Cir. 89 F. 2d 775. See also *Annis-ton Mfg. Co. v. Davis*, 301 U. S. 337. There is certainly nothing unreasonable or arbitrary in the repeal of the provisions of an act which would make possible the recovery of a "windfall" which would have such disastrous effects upon commerce as Congress foresaw and pointed out.

However, in a number of the cases in which the constitutionality of the Portal-to-Portal Act has been challenged, the suggestion has been advanced that while the claims barred by Section 2 of the Act may not be contract claims in the pure sense, they nonetheless partake of the contract of employment because all contracts are entered into with implied reference to the existing laws bearing upon the contractual relationship. In *Seese v. Bethlehem Steel Co.*, *supra*, the Court answered this contention as follows:

It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the Portal-to-Portal Act is that that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards

Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act.

It is a predicate of the Act in question that there must have been no consciousness of intention on the part of the contracting parties that portal-to-portal activities be compensable. Accordingly, the only implied-in-fact agreement on the part of the employer and his employees, which could be said to have a bearing on the matter, would be their implicit agreement to comply with the provisions of the Fair Labor Standards Act as they might thereafter be interpreted by competent authority. However, it is unthinkable that an employer would have intended to bind himself to continue to adhere to such an interpretation beyond the period of time that he was under legal obligation to do so.

Any suggestion that the statutory provision for compensability of "portal-to-portal" activities became an irretrievable part of each employment contract by force of law should be equally fruitless. "Not only are existing laws read into contracts in order to fix obligations as between parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435. Notwithstanding appellees contention (Brief, pp. 10-13) that the Portal-to-Portal Act constituted a veto of the earlier legislation, no provision of the Fair Labor Standards Act required either implied or actual incorporation of its terms by parties to such a contract, as terms of the agreement, in such form that later congresses would be unable to alter the conditions of the employment rela-

tionship without abrogating the contract provisions.¹⁵ Any attempt on the part of one Congress so to tie the hands of a future Congress would obviously be open to most serious question on constitutional grounds. (See and *cf.*, *e. g.*, *Lynch v. United States*, 292 U. S. 571; *North American Com. Co. v. United States*, 171 U. S. 110, 137; *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 463; *Boyd v. Alabama*, 94 U. S. 645, 650; *Stone v. Mississippi*, 101 U. S. 814, 817-818; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558). Plainly no such result was intended and the act cannot properly be given that effect. *Cf. Overnight Motor Co. v. Missel*, 316 U. S. 572, 577.

Accordingly, it is clear that insofar as rights given by the Fair Labor Standards Act have not, in fact, become terms of employment contracts they may be withdrawn by the Congress. Section 2 of the Portal-to-Portal Act of 1947 which relieves employers of the liability of the so-called portal-to-portal claims goes no further and is clearly constitutional.

¹⁵ Bearing in mind the finding of the Congress that the compensability of "portal-to-portal" activities came as a surprise to employers and as an unexpected windfall to employees, it is evident that there is no basis for the application of cases holding that existing rights of enforcement, which have been appended to contracts by state law, and which were presumably known to and relied upon by the parties, become parts of the obligation of contracts which the states are forbidden to impair. See, *e. g.*, *Coombes v. Getz*, 285 U. S. 434, 442; *Hawthorne v. Calef*, 2 Wall. 10, 22-23 (*cf. Ochiltree v. Railroad Co.*, 21 Wall. 249, 252-254); *Treigle v. Acme Homestead Assn.*, 297 U. S. 189, 194. *Cf. McCullough v. Virginia*, 172 U. S. 102, 122-125; *Marcus Brown Holding Co., Inc. v. Feldman*, 256 U. S. 170, 198; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435; *Pritchard v. Norton*, 106 U. S. 124, 132, 136-137; *Chase Securities Corp. v. Donaldson*, *supra*, 315-316; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 550; *Gibbes v. Zimmerman*, 290 U. S. 326, 332; *Vance v. Vance*, 108 U. S. 514, 518-522.

- (b) **The Congress had constitutional authority to abrogate the claims in question in order to accomplish legitimate public purposes through the exercise of its interstate commerce power**

Even without its plenary power to terminate the purely statutory claims involved by withdrawing their legislative support, the Congress clearly had the power to do so through exercise of its powers over interstate commerce. Although no court has found it necessary so to decide, this would be so even if the claims were not purely statutory.

Article I, Section 8, of the Constitution gives to the Congress the power:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Under Section 1 of the Portal-to-Portal Act of 1947, the Congress has found that the continued validity of the subject claims would constitute a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce. And it has declared it to be its policy "to relieve and protect interstate commerce from practices which burden and obstruct it." There can be no question as to the constitutional validity of the end sought to be reached by the Congress. This is the same end that was sought through the enactment of the Fair Labor Standards Act, upon which such claims depend, the validity of which has been established beyond question. *Overnight Motor Co. v. Missel*, 316 U. S. 572, 576-577; *United States v. Darby*, 312 U. S. 100; *Opp. Cotton Mills v. Administrator*, 312 U. S. 126.

As shown in the previous discussion of the findings and policy of the Congress in Section 1 of the Act, it is primarily for the Congress to determine whether and to what extent the existence of such claims interferes with the legislative objective. *Norman v. Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 311-313. There can be no serious question that the findings and policy of the Congress amply support the measures taken by it in Section 2 of the Portal-to-Portal Act.

While Section 10 of Article 1 of the Constitution provides that "No State shall * * * pass any * * * law impairing the obligation of Contracts" and "does not in terms restrict Congress and the United States" (*New York v. United States*, 257 U. S. 591, 601), it is clear that contract rights, like other property rights, are protected by the Fifth Amendment. *Omnia Co. v. United States*, 261 U. S. 502, 508; cf. *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555, 589; *Wright v. Vinton Branch*, 300 U. S. 440, 457. However, it is equally clear that like other property rights, they are owned subject to the possibility of uncompensated destruction resulting from the valid exercise of Congressional powers. *Omnia Co. v. United States*, *supra*, 508-510. All contractual relationships between private parties are entered into not only subject to the existing laws of the United States but, as well, to the changes which the Congress may validly make in such laws. Thus in *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, where for valuable consideration a contract had been made to issue free transportation to an individual, the railroad company was thereafter relieved of liability thereunder by an act of Congress interdict-

ing the use of "free transportation." In so holding the Court (at p. 42) said:

Long before the above cases were decided, it was said in *Knox v. Lee*, 12 Wall. 457, 551, that "as in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate Government authority."

Again in upholding the validity of congressional action in abrogating gold clauses in private bonds¹⁶ the Supreme Court, through Mr. Chief Justice Hughes, in *Norman v. Baltimore & Ohio R. R. Co.*, *supra* (at p. 307), said:

Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a

¹⁶ Attempts to distinguish the *Norman* case, upon the ground that the creditor could still collect in dollars—hence no property was taken from him—lose sight of the fact that the decision applied as well to "gold value" contracts as to contracts for payment in gold. See the *Norman* case, *supra*, at pp. 298-302; *Guaranty Trust v. Henwood*, 307 U. S. 247, 259-261. The legislation struck down contracts for payment of greater sums of money to be measured by the increased money value of a quantity of gold as well as contracts calling for payment in *speci*. *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 334, 337-340. By reason of the enactment of the legislation the beneficiaries of "gold clause" obligations became entitled to fewer dollars than they had had a contract right to receive prior to its enactment. The *Norman* case is clearly in point. Likewise, arguments to the effect that the doctrine of the *Norman* case was overruled *sub silentio* by the later decision in *Louisville Bank v. Radford*, *supra*, are conclusively refuted by the still later decisions in other cases cited in this note, *supra*.

congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

In *Overnight Motor Co. v. Missel*, 316 U. S. 572, 577, with reference to the constitutional applicability of the overtime provisions of the Fair Labor Standards Act to a contract of release there involved, the Supreme Court, through Mr. Justice Reed, stated:

If overtime pay may have this [beneficial] effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power." *Norman v. B. & O. R. Co.*, 294 U. S. 240, 306-311.

And, as previously shown, nothing in the Fair Labor Standards Act can properly be construed as an attempt by the Congress to place contracts embodying its terms beyond such "reach."

It is not contended that the power of the Congress to abrogate private rights in order to reach constitutionally authorized legislative objectives is merely a power to deal with emergencies, as appellants suggest. Rather, the principle of Federal supremacy in the field of delegated powers inheres in the Constitution itself (Art. VI) and has found frequent and varied expression in the decisions of the Supreme Court.¹⁷

¹⁷ In addition to the numerous cases cited in the opinion of the Supreme Court in *Norman v. Baltimore & Ohio R. R. Co.*, *supra*, pp. 307-311, see and compare *Fleming v. Rhodes*, 331 U. S. 100, 107; *Guaranty Trust Co. v. Henwood*, 307 U. S. 247, 258-259; *American Power Co. v. S. E. C.*, 329 U. S. 99-100, 103-104; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435; *DeLaval Steam Turbine Co. v. U. S.*, 284 U. S. 61, 73; *Mitchell v. Clark*, 110 U. S.

Since the rights which have been found to have been given employees by the Fair Labor Standards Act, did not involve any pledge of "the credit of the United States" (cf. *Perry v. United States*, 294 U. S. 330, 350-351; *Lynch v. United States*, 292 U. S. 571), the employees' position to resist the exercise of the interstate commerce power by the Congress, through the Portal-to-Portal Act, certainly is not improved by the fact that their claims depend for validity upon prior legislation of the Congress rather than upon contracts. As previously indicated, the Congress has plenary power to withdraw benefits conferred by and resting exclusively upon its prior legislation. Moreover, in absence of the exercise of a constitutional power requiring the assumption of a continuing obligation on the part of the United States, an earlier Congress may not validly restrict later Congresses from exercising their constitutional powers. See *Lynch v. United States*, *supra*, 579; *North American Com. Co. v. United States*, 171 U. S. 110, 137; *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 463.

It follows that, even if the rights conferred by the Fair Labor Standards Act could be regarded as "vested" rights in the same sense that contract rights are "vested" rights, the Congress could constitutionally terminate them in the exercise of its power to regulate interstate commerce.

633, 643; *Veix v. Sixth Ward Assn.*, 310 U. S. 32, 38-41; *Calhoun v. Massie*, 253 U. S. 170, 175-176; *Wright v. Union Central Ins. Co.*, 304 U. S. 502, 516; *Graham & Foster v. Goodcell*, 282 U. S. 409, 429-430; *North American Co. v. S. E. C.*, 327 U. S. 686, 707-708; *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 341; *Bowles v. Willingham*, 321 U. S. 503, 516-619; *Steuart & Bro. v. Bowles*, 322 U. S. 398, 405.

3. In relieving the courts of jurisdiction to entertain portal-to-portal cases, the Congress acted within its constitutional authority

In Section 1 of the Portal-to-Portal Act, the Congress found that if the Fair Labor Standards Act, so interpreted as to give validity to "portal-to-portal" claims, or such claims "were permitted to stand, * * * the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged," and it declared it "to be the policy of the Congress in order to meet the existing emergency and to correct existing evils" among other things "to define and limit the jurisdiction of the courts." The tremendous volume of litigation involving such claims has been commented upon in the discussion of the legislative history of the Act, *supra*. The statistics adequately speak for themselves.

In Subsections (a) through (c) of Section 2 of the Portal-to-Portal Act of 1947, the Congress relieved employers of liability on such claims and prohibited the inclusion of time devoted to so-called "portal-to-portal" activities in computing the working time of employees for the purpose of application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act. In Subsection (d) it relieved the courts of

jurisdiction of any action or proceeding * * * to enforce liability or impose punishment for or an account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with

respect to an activity which was not compensable under Subsections (a) and (b) of this Section.

Any attack upon the constitutionality of Section 2 of the Portal-to-Portal Act must, of necessity, constitute an attack upon this portion of the legislation because, without jurisdiction of the cause, the Court could not properly pass upon the validity of any portion of the statute.

By Article I, Section 8, of the Constitution, the Congress is given power "to constitute Tribunals inferior to the Supreme Court" and Article III provides that "the judicial power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish" and that, except in the cases in which the Supreme Court is given original jurisdiction, "the Supreme Court shall have appellate jurisdiction both at Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Constitution clearly contemplates that the judicial branch of the Government shall exercise the judicial power of the United States free of interference from the legislative branch,¹⁸ but, excepting the original jurisdiction conferred upon the Supreme Court by the Constitution itself, the Congress was clearly given the power to define the cases in which the judicial power shall be exercised.

¹⁸ Cf. *United States v. Klein*, 13 Wall. 128; *Pope v. United States*, 100 C. Cls. 375, 53 F. Supp. 570, 572-574 (reversed in 323 U. S. 1; reversal explained 62 F. Supp. 408, 411).

In *Kline v. Burke Construction Co.*, 260 U. S. 226, 234, the Supreme Court, speaking through Mr. Justice Sutherland, said:

* * * Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner v. Bank of North America*, 4 Dall. 8, 10; *United States v. Hudson & Goodwin*, 7 Cranch, 32; *Seldon v. Sill*, 8 How. 441, 448; *Stevenson v. Fain*, 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an Act of Congress to confer it. *The Mayor v. Cooper*, 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors v. Osborne*, 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an Act of Congress after its exercise has begun, cannot well be described as a constitutional right.

See and compare, also, *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 330; *Railroad Company v. Grant*, 98 U. S. 398, 401, 402 (and cases cited); *Lockerty v. Phillips*, 319 U. S. 182, 187; *Ex parte McCardle*, 7 Wall. 506, 514; *Norris v. Crocker*, 13 How. 429, 439, 440; *In re Hall*, 167 U. S. 38, 42; *Insurance Company v. Ritchie*,

5 Wall. 541, 544; *Smallwood v. Gallardo*, 275 U. S. 56; *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284, 287 (CCA 2, 1934), cert. den. 293 U. S. 595; *Railroad Co. v. Grant*, 8 Otto 398, 401-402.

The attacks which have been made upon the constitutionality of Section 2 (d) of the Act, which have thus far come to our attention, have been based primarily upon decision holding that States may not destroy or so change remedies as to impair the obligation of contracts.¹⁹ Since Section 10 of Article I of the Constitution, under which such State action is invalidated, is not applicable in terms to the Federal Government and since the Congressional authority over the jurisdiction of the federal courts is given by the Constitution itself in plenary terms, such cases are inapposite where the jurisdiction of federal courts is concerned.²⁰ Moreover, as we have shown in earlier por-

¹⁹ E. g., *Walker v. Whitehead*, 16 Wall. 314; *Edwards v. Kearzey*, 96 U. S. 595, 607; *South Carolina v. Goullard*, 101 U. S. 433; *Tennessee v. Snead*, 96 U. S. 69; *Worthen v. Thomas*, 292 U. S. 426, 431-432; Cf. *Gibbes v. Zimmerman*, 290 U. S. 326, 332; *Bronson v. Kinzie*, 1 How. 311, 320. *Grignon's Lessee v. Astor, et al.*, 2 How. 319, 341-344; *Elliott v. Peirsol*, 1 Pet. 328, 340-341; *Worthen Co. v. Kavanaugh*, 295 U. S. 56; *Richmond Corp. v. Wachovia Bank*, 300 U. S. 124; *Wheeler v. Jackson*, 137 U. S. 245; *Sturges v. Crowninshield*, 4 Wheat. 122, 197-201; *Sohn v. Waterson*, 17 Wall. 596; *Terry v. Anderson*, 95 U. S. 628, 632-633; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398; *Fletcher v. Peck*, 6 Cranch 87, 135-137; *New Jersey v. Wilson*, 7 Cranch 164.

²⁰ While the constitutionality of the provision of Section 2 (d) withdrawing from State courts jurisdiction to entertain portal-to-portal actions cannot properly be in question here, it may be of interest that the report of the House Committee on the Judiciary (No. 71, to Accompany H. R. 2157, 80th Cong., 1st Sess., p. 6) indicates that it relied upon *Bowles v. Willingham*, 321 U. S. 503, as establishing the power of the Congress to withdraw from state courts the adjudication of causes arising out of Federal statutes. See and cf., also, *Collector v. Hubbard*, 12 Wall. 1, 15, and cases cited *supra* in support of the Congressional power to terminate rights conferred exclusively by Federal statutes.

tions of this Brief, no contract claim is affected by Section 2 (d) of the Act.

No necessity arises in these actions to consider the question of whether the power of the Congress to withdraw cases from the jurisdiction of the District Courts is in fact plenary in the sense that it could be exercised arbitrarily or capriciously. Obviously, these are not such cases. Section 2 (d) of the Act is clearly constitutional.

CONCLUSION

For the foregoing reasons the decisions of the Court herein should sustain the constitutionality of the Portal-to-Portal Act of 1947.

Respectfully submitted.

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APPENDIX A

REPORTED DECISIONS OF UNITED STATES DISTRICT COURTS
SUSTAINING THE CONSTITUTIONALITY OF THE PORTAL-TO-
PORTAL ACT OF 1947 ²¹

- Ackerman v. J. I. Case Co.* (Wisconsin), 74 F. Supp. 639.
- Adkins v. E. I. duPont de Nemours & Co.* (Oklahoma), 13 Labor Cases, par. 64,025, 7 WH Cases 298.
- Alameda v. Paraffine Co., Inc.* (California), 75 F. Supp. 282.
- Bateman v. Ford Motor Company* (Michigan), 76 F. Supp. 178.
- Blessing v. Hawaiian Dredging Co.* (Dis. of Col.), 76 F. Supp. 556.
- Bochle v. Electro Metallurgical Co.* (Oregon), 72 F. Supp. 21.
- Bonner v. Elizabeth Arden* (New York), 13 Labor Cases, Par. 64,147, 7 WH Cases 469.
- Borucki v. Continental Baking Co.* (New York), 74 F. Supp. 815.
- Breusing v. Fisher Body Division* (Missouri), 74 F. Supp. 541.
- Bumpus v. Remington Arms Co.* (Missouri), 74 F. Supp. 788.
- Burfeind v. Eagle-Picher Co. of Texas* (Texas), 71 F. Supp. 929.
- Cardinale v. General Motors Corp.* (Georgia), 13 Labor Cases, par. 64,088, 7 WH Cases 378.
- Cochran v. St. Paul & Tacoma Lumber Co.* (Washington), 73 F. Supp. 288.

²¹ In addition to the cases appearing in this list, and not counting the 267 portal-pay suits dismissed within six weeks after the enactment of the Portal-to-Portal Act (1947 WH 1632), we have been advised of more than 70 District Court decisions dismissing such suits as to which we have been unable to locate published reports.

- Colvard v. Southern Wood Preserving Co.* (Tennessee), 74 F. Supp. 804.
- Darr v. Mutual Life Insurance Company of New York* (New York).
- DeMaio v. Grant Storage Battery Co.* (Minnesota), 14 Labor Cases, par. 64,285, 7 WH Cases 721.
- Ditto v. American Aluminum Co.* (California), 73 F. Supp. 955.
- Donovan v. Republic Steel Corp.* (New York), 14 Labor Cases, par. 64,295, 7 WH Cases, 644.
- Elting v. North American Aviation, Inc. of Kansas* (Kansas), 13 Labor Cases, par. 64,154, 7 WH Cases, 491.
- Ferrer v. Waterman Steamship Corporation* (Puerto Rico), 76 F. Supp. 60.
- Glowienke v. Hawaiian Dredging Co.* (Illinois), 14 Labor Cases, par. 64,343, 7 WH Cases, 637.
- Grazeski v. Federal Shipbuilding & Dry Dock Co.*, (New Jersey), 76 F. Supp. 845.
- Hart v. Aluminum Co. of America* (Pennsylvania), 73 F. Supp. 727.
- Hays v. Hercules Powder Co.* (Missouri), 13 Labor Cases, par. 64,123, 7 WH Cases, 381.
- Holland v. General Motors Corp.* (New York), 75 F. Supp. 274 (affirmed July 8, 1948, as *Battaglia v. General Motors Corp.*, 8 WH Cases 108, 15 Labor Cases, par. 64,169 (CCA 2)).
- Hollingsworth v. Federal Mining & Smelting Co.* (Idaho), 74 F. Supp. 1009.
- Hornbeck v. Dain Mfg. Co.* (Iowa), 13 Labor Cases, par. 64,005. 7 WH Cases 296.
- Jackson v. Northwest Airlines Inc.* (Minnesota), 76 F. Supp. 121.
- Johnson v. Park City Consol. Mines Co.* (Missouri), 73 F. Supp. 852.

Kirkham v. Pacific Gas & Electric Co. (California), 13 Labor Cases, par. 64,199, 7 WH Cases 582.

Lasater v. Hercules Powder Co. (Tennessee), 73 F. Supp. 264.

Lassiter v. Atkinson Co. (Washington), 7 WH Cases 816.

Local 626, Etc., v. General Motors Corp. (Connecticut), 76 F. Supp. 593.

Lockwood v. Hercules Powder Company (Missouri), 14 Labor Cases, par. 64,366, 7 WH Cases 720.

Markert v. Swift & Co. (New York), 13 Labor Cases, par. 64,145, 7 WH Cases 459.

May v. General Motors Corporation (Georgia), 73 F. Supp. 878.

McLaughlin v. Todd & Brown, Inc., 7 WH Cases 1014.

Moeller v. Eastern Gas and Fuel Associates (Massachusetts), 74 F. Supp. 937.

Plummer v. Minneapolis-Moline Power Implement Co. (Minnesota), 76 F. Supp. 745.

Quinn v. California Shipbuilding Corp. (California), 76 F. Supp. 742.

Reid v. Day & Zimmerman, Inc. (Iowa), 73 F. Supp. 892. (Affirmed May 25, 1948, 7 WH Cases 1040, 14 Labor Cases, par. 64,545.)

Sadler v. W. S. Dickey Clay Mfg. Co. (Missouri), 73 F. Supp. 690.

Seese v. Bethlehem Steel Co. (Maryland), 74 F. Supp. 412. (Affirmed at 168 F. (2d) 58.)

Sinclair v. U. S. Gypsum Co. (New York), 75 F. Supp. 439.

Smith v. American Can Co. (Illinois), 14 Labor Cases, par. 64,281, 7 WH Cases 603.

Smith v. Cudahy Packing Co. (Minnesota), 73 F. Supp. 141.

Sochulak v. American Brake Shoe Co. (New York), 14 Labor Cases, Par. 64,220, 7 WH Cases 584.

- Sparacino v. Colgate Aircraft Corp.* (New York), 13 Labor Cases, par. 64,152, 7 WH Cases 397.
- Story v. Todd Houston Shipbuilding Corp.* (Texas), 72 F. Supp. 690.
- Wan v. E. E. Black, Ltd.* (Hawaii), 75 F. Supp. 553.
- Wood v. Atkinson* (Washington), 14 Labor Cases, par. 64,466, 7 WH Cases 846.

No. 11925

United States
Circuit Court of Appeals
For the Ninth Circuit.

MATSON NAVIGATION COMPANY,
A Corporation,
Appellant,
vs.

WAR DAMAGE CORPORATION, a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
JUN 24 1948

PAUL P. O'BRIEN,
CLERK

No. 11925

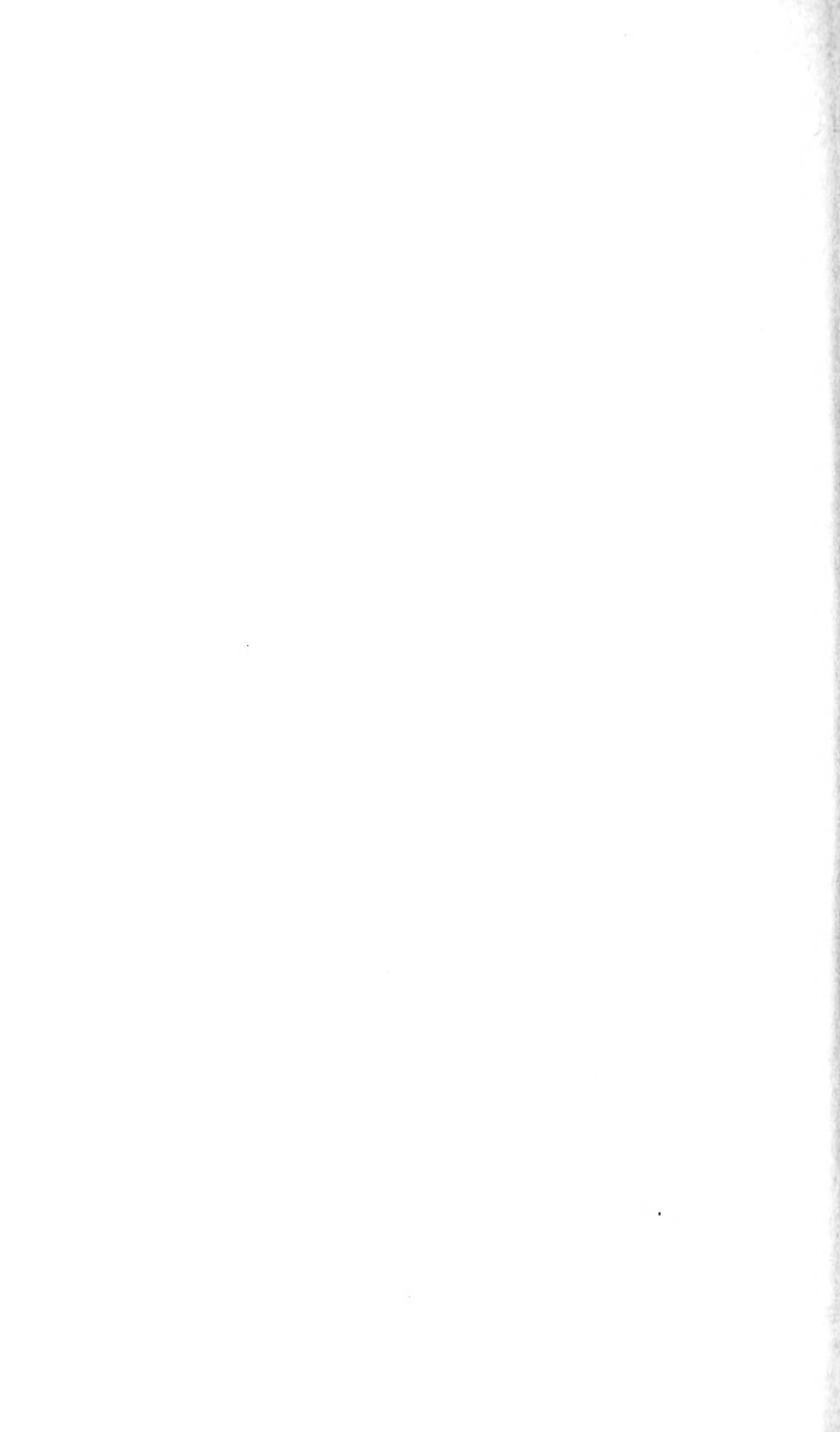
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California.

No. 24575—G

MATSON NAVIGATION COMPANY,

a corporation,
Plaintiff,

vs.

WAR DAMAGE CORPORATION, a corporation,
Defendant.

COMPLAINT FOR COMPENSATION FOR
LOSS OF PERSONAL PROPERTY IN
TRANSIT AS A RESULT OF ENEMY
ATTACK

Plaintiff complains of defendant above named and
for cause of action alleges:

I.

That plaintiff was at all of the times herein mentioned, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California with principal office and place of business at 215 Market Street in the City and County of San Francisco, State of California.

II.

That on and prior to the 12th day of December, 1941, plaintiff was the owner of the American steam-

ship Lahaina which [1*] said vessel was at said time in transit between a port or ports of the Hawaiian Islands and a port of the continental United States. That on the 11th day of December, 1941, said steamship was shelled and seriously damaged by enemy attack, to wit, by attack of a submarine belonging to the Empire of Japan, a public enemy of the United States. That as a result of said shelling the said steamship sank in the waters of the Pacific Ocean a great distance from shore on December 12, 1941, and was and is totally lost to plaintiff.

III.

That defendant, War Damage Corporation, is a corporation organized and existing pursuant to the provisions of section 5d of the Reconstruction Finance Corporation Act of January 22, 1932, 47 State. 5, as amended, supplemented and revised. Said corporation was originally incorporated under the name War Insurance Corporation. On March 30, 1942, by an amendment of its Articles of Incorporation the name of said corporation was changed to War Damage Corporation. Under its Articles of Incorporation such defendant has power to sue and be sued in any Court of competent jurisdiction. Plaintiff is informed and believes that the Government of the United States of America is the owner of more than one-half of the capital stock of such defendant.

*Page numbering appearing at foot of page of original certified Transcript of Record.

IV.

That on December 13, 1941, the Federal Loan Administrator publicly announced that, with the approval of the President, the Reconstruction Finance Corporation had created the War Insurance Corporation "to provide reasonable protection against losses resulting from enemy attacks which may be sustained by owners of property in Continental United States through damage to or destruction of buildings, structures and personal property, [2] including goods, growing crops and orchards. Pending completion of details, any such losses will be protected from December 13, 1941, up to a total of \$1,000,000,000. Accounts, bills, currency, debts, evidences of debt, money, notes, securities, paintings and objects of art will not be covered. For the time being no premium will be charged for this protection, and no declaration or report required unless there is a loss." (Press release of the Federal Loan Agency No. 634.) On December 22, 1941, the Federal Loan Administrator publicly announced that, with the approval of the President, the War Insurance Corporation would extend the same protection to property owners in Alaska, Hawaii, the Philippine Islands and Porto Rico and the Virgin Islands as it does to property owned in Continental United States. (Press release of the Federal Loan Agency No. 636.)

V.

That in March, 1942, the Congress of the United States enacted and on March 27, 1942, the President

approved, a law amending the Reconstruction Finance Corporation Act and therein provided that the War Damage Corporation should make compensation for any loss of or damage to property, real and personal, situated in the United States (including the several States and District of Columbia), the Philippine Islands, the Canal Zone, the territories and possessions of the United States or in transit between any points located in any of said places, sustained as a result of or from enemy attack, subsequent to December 6, 1941, and prior to a date thereafter, to wit, after March 27, 1942, to be determined by the Secretary of Commerce (Ch. 198, Section 2, 56 Stat. 175; U. S. Code, Title 15, Section 606b-2).

VI.

That as a result of the loss of the said S.S. Laina as [3] above set forth, plaintiff sustained loss in the amount of Eight Hundred Twenty Thousand Dollars (\$820,000.00) and on or about the 29th day of December, 1944, duly made and presented to defendant its claim in such amount on account of its aforesaid loss. On or about the 19th day of January, 1945, defendant, War Damage Corporation, informed plaintiff that such claim would not be recognized. That a copy of said letter declining such claim is attached hereto and marked Exhibit "A" and by this reference incorporated herein. That defendant, War Damage Corporation, has not compensated plaintiff for its said loss or any part thereof and there is now due, owing and unpaid to plaintiff by defendant said sum with interest.

VII.

That plaintiff's action herein arises under the said Reconstruction Finance Corporation Act as amended, supplemented and revised and the matter in controversy exceeds the sum of \$3,000.00. Jurisdiction exists under and by virtue of section 24, par. 1, of the Judicial Code, (18 Stat. 470, as amended; 28 U. S. Code, sec. 41(1)) and the Act of February 13, 1925, C. 229, sec. 12 (43 Stat. 941; 28 U. S. Code, sec. 42).

Wherefore, plaintiff prays judgment against defendant in the sum of Eight Hundred Twenty Thousand Dollars (\$820,000.00) together with interest thereon and costs of suit herein incurred, and that plaintiff shall have such other and further relief as may be meet and proper in the aforesaid premises.

Dated: March 22nd, 1945.

LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Plaintiff [4]

EXHIBIT "A"

War Damage Corporation
Washington 25

January 19, 1945.

Mr. Melvin Price
Matson Navigation Company
215 Market Street
San Francisco 5, California
SS Lahaina

Dear Mr. Price:

Acknowledgment is made of your letter of December 29, 1944.

The statutory provisions regarding property in transit to which you refer are not interpreted by this Corporation as intended to have application to vessels, and, pursuant to authority contained in the Act, all vessels and water-craft other than (a) those used exclusively for storage, housing, manufacturing or generating power, (b) vessels while under construction, until delivery by the builder or sailing on delivery or trial trip, whichever shall first occur, and (c) pleasure water-craft while laid up afloat or ashore, have, with the approval of the Secretary of Commerce, been excluded from the protection authorized by the Act of March 27, 1942. It is, therefore, impossible for this Corporation to recognize the claim stated in your letter.

Very truly yours,

/s/ M. W. KNARR,

Secretary.

[Endorsed]: Filed Mar. 22, 1945 [5]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, and in answer to the Complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I of the Complaint.

II.

Admits the allegations of Paragraph II of plaintiff's Complaint except denies that the Steamship

Lahaina, on the 12th day of December, 1941, or at any other time, was "in transit" between a port or ports of the Hawaiian Islands and a port of the continental United States within the meaning of Section 5-g of the Reconstruction Finance Corporation Act as added by the Act of March 27, 1942 (Chapter 198, Section 2, 56 Stat. 175; U. S. Code, Title 15, Section 606b-2). [6]

III.

Denies each and every, all and singular, generally and specifically the allegations of paragraph III except admits that War Damage Corporation is a corporation organized and existing pursuant to the provisions of Sections 5d and 5g of the Reconstruction Finance Corporation Act, as amended; admits that the entire capital stock of the defendant is owned by the Government of the United States; admits that the defendant was originally incorporated under the name of War Insurance Corporation which said name was changed to War Damage Corporation by an amendment of its Articles of Incorporation on March 30, 1942; admits that under its Articles of Incorporation defendant in some instances has the power to sue and be sued in courts of competent jurisdiction; denies that the power to sue and be sued granted by defendant's Articles of Incorporation authorizes or permits defendant to be sued on the matters set forth in plaintiff's Complaint and in this connection alleges that its power to sue and be sued is restricted to its business and commercial functions, engagements,

contracts and/or undertakings; that the claim for relief set forth in the Complaint herein is not predicated upon any business or commercial function, engagement, contract and/or undertaking.

IV.

Admits the allegations of Paragraph IV of the Complaint, but in this connection alleges that the public announcements referred to in said Paragraph IV have no application to the claim for relief set forth in plaintiff's Complaint.

Further answering Paragraph IV of the Complaint, defendant alleges that the public announcement of December 13, 1941 (Press Release of the Federal Loan Agency No. 634) and the public announcement of December 22, 1941 (Press Release of the Federal [7] Loan Agency No. 636) both provide in the last paragraphs thereof, as follows:

“Other terms and conditions for such protection will be announced as established.”

V.

Answering the allegations of Paragraph V of plaintiff's Complaint admits that in March, 1942, the Congress of the United States enacted, and on March 27, 1942, the President approved, a law amending the Reconstruction Finance Corporation Act, which law is designated as Ch. 198, Section 2, 56 Stat. 175; U. S. Code, Title 15, Section 606b-2; denies that said statute is correctly stated by plaintiff and accordingly denies each and every, all and singular, generally and specifically, the allegations of said paragraph not hereinabove admitted and

in this connection alleges that said statute provides as follows:

“The Reconstruction Finance Corporation is hereby directed to continue to supply funds to the War Damage Corporation, a corporation created pursuant to section 5d of this Act; and the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this subsection. Such funds shall be supplied only upon request of the Secretary of Commerce, with the approval of the President, and the aggregate amount of the funds so supplied shall not exceed \$1,000,000,000. The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable. Such protection shall be made available through the War Damage Corporation on and after a date to be determined and published by the Secretary of Commerce which shall not be later than

July 1, 1942, upon the payment of such premium or other charge, and subject to such terms and conditions, as the War Damage Corporation, with the approval of the Secretary of Commerce, may establish, but, in view of the national interest involved, the War Damage Corporation shall from time to time establish uniform rates for each type of property with respect to which such protection is made [8] available, and, in order to establish a basis for such rates, such Corporation shall estimate the average risk of loss on all property of such type in the United States. Such protection shall be applicable only (1) to such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States, (2) to such property in transit between any points located in any of the foregoing, and (3) to all bridges between the United States and Canada and between the United States and Mexico; provided, that such protection shall not be applicable after the date determined by the Secretary of Commerce under this subsection to property in transit upon which the United States Maritime Commission is authorized to provide marine war-risk insurance. The War Damage Corporation, with the approval of the Secretary

of Commerce, may suspend, restrict, or otherwise limit such protection in any area to the extent that it may determine to be necessary or advisable in consideration of the loss of control over such area by the United States making it impossible or impracticable to provide such protection in such area.

(b) Subject to the authorizations and limitations prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such damage.

Approved March 27, 1942.

VI.

Answering the allegations of Paragraph VI of the Complaint, alleges that defendant has no information or belief sufficient to permit it to answer the allegation that as a result of the loss of the SS Lahaina plaintiff sustained a loss in the amount Eight Hundred Twenty Thousand (\$820,000.00) Dollars or in any sum for the loss of the SS Lahaina; admits that it denied said claim and that the copy of the letter attached to and incorporated

in the Complaint and marked "Exhibit A" is a true copy of its letter of January 19, 1945, denying said claim; admits that it has not compensated plaintiff for its said loss or any part thereof; denies that plaintiff on or about December 29, 1944, or at any time "duly" made and/or [9] presented its claim for such loss and in this connection alleges that such claim was not presented to defendant within the time required by the Public Announcement of December 30, 1942, as more fully set forth and alleged herein in the Tenth Separate and Affirmative defense, and further alleges that plaintiff did not comply with the "Requirements in Case of Loss" set forth on page 2 of defendant's standard insurance policy (W.D.C. Form No. 1) as more fully set forth and alleged herein in the Ninth Separate and Affirmative Defense; denies that there is now due, owing and unpaid to plaintiff by defendant the sum of Eight Hundred Twenty Thousand (\$820,000.00) Dollars or any part thereof or any sum at all.

VII.

Denies each and every, all and singular, generally and specifically the allegations of Paragraph VII of the Complaint except admits that the amount sued for in the Complaint exceeds the sum of Three Thousand (\$3,000.00) Dollars.

By way of separate and affirmative defenses to plaintiff's Complaint, defendant alleges:

First Separate and Affirmative Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Separate and Affirmative Defense

The court is without jurisdiction in the matter because the said Reconstruction Finance Corporation Act, and particularly Section 5g thereof, restricts plaintiff's remedy to an administrative remedy, if any.

Third Separate and Affirmative Defense

The court is without jurisdiction in the matter because [10] jurisdiction of the action pleaded has not been given to the courts.

Fourth Separate and Affirmative Defense

The relief prayed for in the Complaint is erroneous and improper.

Fifth Separate and Affirmative Defense

Defendant states and alleges that under and pursuant to the powers and authorities granted it by Section 5g of the Reconstruction Finance Corporation Act as added by the Act of March 27, 1942, Ch. 198, Sec. 2, 56 Stat. 175, Tit. 15 U.S.C.A. Sec. 606b-2, the defendant, with the approval of the Secretary of Commerce, promulgated certain regulations, rules and rates, terms and conditions and general exceptions relating, among other things, to the properties and things for which war risk insurance coverage was offered and made available by it under said Act, which are known as "Regulations 'A' " and which it caused to become effective on July 1, 1942; that a copy of said "Regulations 'A' "

is attached hereto, marked "Defendant's Exhibit A" and incorporated herein and made a part hereof as fully as though set forth herein in full; that by virtue of the provisions of its "Regulations 'A'" issued as aforesaid, the only watercraft for which it has at any time offered war risk insurance protection are:

- (a) Vessels used exclusively for storage, housing, manufacturing or generating power;
- (b) Pleasure craft (including vessels utilized for pleasure fishing, but excluding those employed in commercial fishing), but only while laid up afloat or ashore;
- (c) All vessels or craft while under construction until delivery by the builder or sailing on delivery or trial trip, whichever shall first occur;

that pursuant to the provisions of Section 5g of the Reconstruction Finance Corporation Act, as amended, the defendant, immediately upon entering upon its statutory functions under subsection (b) of the [11] said Section 5g, adopted an administrative procedure under which the exclusions provided in said "Regulations A" as aforesaid were made applicable to all claims arising under subsection (b); that under and pursuant to the provisions of its "Regulations A" and in accordance with its established administrative practice defendant did exclude and except the loss referred to in the Complaint from the war risk insurance protection offered by it.

Sixth Separate and Affirmative Defense

Defendant states and alleges that under and pursuant to Section 5g of the Reconstruction Finance Corporation Act, as added by the act of March 27, 1942, Ch. 198, Sec. 2, 56 Stat. 175, Title 15 U.S.C.A. Sec. 606b-2, it (War Damage Corporation) is authorized to make general exceptions to the protection authorized by said Section 5g; that pursuant to said authorization, on October 2, 1944, defendant duly adopted and approved a resolution excepting and excluding from any and all protection under said Act, among other things, all vessels and water-craft wherever situated, other than (a) vessels used exclusively for storage, housing, manufacturing, or generating power; (b) vessels while under construction, until delivery by the builder or sailing on delivery or trial trip, whichever shall first occur; and (c) pleasure water-craft while laid up, afloat or ashore, within certain limits indicated in the resolution; that a copy of said resolution is hereto attached marked "Defendant's Exhibit B" and incorporated herein and made a part hereof as fully as though set forth herein in full; that the exclusions specified in said resolution of October 2, 1944, are in accordance with and pursuant to the administrative procedure theretofore adopted by and consistently followed by defendant corporation throughout its corporate existence; that the aforesaid resolution was approved by the Secretary of Commerce as required by said Section 5g of the Reconstruction Finance Corporation Act; [12] that the SS Lahaina is of a class of property excepted and

excluded by said resolution from protection under said Section 5g, and that accordingly plaintiff is not entitled to recover herein.

Seventh Separate and Affirmative Defense

Defendant states and alleges that under and pursuant to the powers and authorities granted it by Section 5g of the Reconstruction Finance Corporation Act, as added by the Act of March 27, 1942, Ch. 198, Sec. 2, 56 Stat. 175, Tit. 15 U.S.C.A. Sec. 606b-2, War Damage Corporation was not authorized to provide war risk insurance on property upon which the United States Maritime Commission is authorized to provide marine war risk insurance; that the United States Maritime Commission, at all times herein mentioned and at all times mentioned in plaintiff's complaint was and now is authorized under the provisions of the Merchant Marine Act, 1936, June 29, 1936, Ch. 858, Title II, as amended June 29, 1940, Ch. 447, 54 Stat. 690, Tit. 46 U.S.C.A. Sec. 1128a, and as amended April 11, 1942, Ch. 240, 56 Stat. 214, Tit. 46 U.S.C.A. Sec. 1128a, to insure against loss or damage by the risk of war, American vessels; that at no time has War Damage Corporation offered to insure or insured against loss of or damage to property, real and personal, which may result from enemy attack, where such protection was authorized to be insured against the risks of war by the United States Maritime Commission; that plaintiff's vessel SS Lahaina was, at the time of loss, of American registry.

Eighth Separate and Affirmative Defense

That pursuant to Section 5g of the Reconstruction Finance Corporation Act as added by the act of March 27, 1942, Ch. 198, Sec. 2, 56 Stat. 175, Title 15 U.S.C.A., Sec. 606b-2, and the authorized and established administrative practice of defendant, all losses [13] sustained subsequent to December 6, 1941, and a date determined by the Secretary of Commerce, to wit, July 1, 1942, for which the defendant was and is authorized to give any protection, were and are adjusted as if defendant's policy of insurance (W.D.C. Form No. 1) were in fact in force at the time of such loss and were in fact issued for such loss; that the right of action, if any, set forth in the complaint is barred because this cause of action was not commenced within twelve months after the date of loss, as required by defendant's policy, W.D.C. Form No. 1, a specimen copy of which is attached hereto, marked "Defendant's Exhibit C" and incorporated herein and made a part hereof as fully as though set forth in full herein.

Ninth Separate and Affirmative Defense

That pursuant to the Reconstruction Finance Corporation Act as added by the act of March 27, 1942, Ch. 198, Sec. 2, 56 Stat. 175, Title 15 U.S.C.A. Sec. 606b-2 and the authorized and established Administrative practice of defendant, all losses sustained subsequent to December 6, 1941, and a date determined by the Secretary of Commerce, to wit, July 1,

1942, for which the defendant was and is authorized to give any protection, were and are adjusted as if defendant's policy of insurance (W.D.C. Form No. 1) were in fact in force at the time of such loss and were in fact issued for such loss; that the right of recovery, if any, alleged in the Complaint is barred because plaintiff did not comply with the "Requirements in Case of Loss" set forth on page 2 of the said policy, (a specimen copy of which is attached hereto, marked "Defendant's Exhibit C" and incorporated herein) in that plaintiff did not give immediate written notice of said loss to defendant and did not file with the defendant within sixty days after the loss a proof of loss as required by said policy and did not at any time file a proof of [14] loss which complied with the terms of said policy; that defendant at no time extended plaintiff's time for filing said proof of loss.

Tenth Separate and Affirmative Defense

That on December 30, 1942, the Secretary of Commerce of the United States, acting for and on behalf of defendant, War Damage Corporation, duly issued a public announcement that stated, among other things, that all claims for loss or damage to property, in transit between points in the United States and its territories and possessions, which resulted directly from enemy attack between December 6, 1941, and July 1, 1942, must be filed with the Washington office of the War Damage Corporation on or before February 1, 1943; that a copy of said public announcement is attached hereto marked

“Defendant’s Exhibit D” and is incorporated herein and made a part hereof as fully as though set forth in full herein that the right of recovery, if any, alleged in the Complaint is barred because plaintiff did not file claim with the defendant by February 1, 1943, as required by the said public announcement.

Wherefore, defendant prays that the Complaint herein be dismissed with costs to the defendant and for such other and further relief as may be proper.

ALLAN E. CHARLES,
EDWARD D. RANSOM,
LILLICK, GEARY, OLSON &
CHARLES,

Attorneys for Defendant.

State of California,
City and County of San Francisco—ss.

Edward D. Ransom, being first duly sworn, deposes and says:

That he is associated with the firm of Lillick, Geary, Olson & Charles, attorneys for Defendant, War Damage Corporation, a corporation; that the office of said attorneys is within the City and County of San Francisco; that affiant is authorized to and does make this varification on behalf of the defendant, War Damage Corporation, for the reason that there are no officers of said corporation within the district of this honorable court; that he has read the within Answer and knows the contents thereof and that the same is true of his own knowledge

except as to those matters alleged upon information and belief and as to those matters he believes them to be true.

EDWARD D. RANSOM.

Subscribed and sworn to before me this 12th day of November, 1946.

[Seal] EMMA L. MacHUGH,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Jan. 15, 1948.

Receipt of a copy of the within Answer is admitted this 12th day of Nov., 1946.

HALL, HENRY & OLIVER,
Attorneys for..... [16]

WAR DAMAGE CORPORATION

WASHINGTON, D. C.

REGULATIONS

RULES AND RATES

All quotations for insurance under policies to be issued by War Damage Corporation shall be made subject to the Regulations herein set forth and all policies of insurance shall be issued in accordance therewith. Such Regulations are subject to change or amendment upon publication by War Damage Corporation. Notice of such change or amendment will be given to Fiduciary Agents.



W.D.C. — REGULATIONS "A" — EFFECTIVE JULY 1, 1942

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Additional copies of these Regulations or application forms will be available from established Regional Rating Organizations or Bureaus.

FOREWORD

WAR DAMAGE CORPORATION—War Damage Corporation is a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, herein called the "Corporation." Pursuant to Section 5g of the Reconstruction Finance Corporation Act, as amended, the Corporation is authorized to provide reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack). The Corporation is prepared to offer such protection in accordance with the Regulations set forth herein, as may be amended from time to time by the Corporation. These Regulations contain appropriate instructions to Producers and Fiduciary Agents regarding the issuance of policies of insurance by the Corporation. Inquiries of Producers concerning these Regulations or any other matters relating to the Corporation's program should be directed to a Fiduciary Agent.

TERRITORY—For the present, insurance will be written on properties situated in the Continental United States of America, Alaska, Virgin Islands, Hawaii, Porto Rico and the Canal Zone.

EXPLANATION OF TERMS USED HEREIN

APPLICANT—The term "Applicant" shall mean any person, public or private, including any individual, partnership, corporation, association, State, County, Municipality, or other political subdivision, having an insurable interest in property eligible for coverage by policies of insurance issued by the Corporation pursuant to these Regulations and making application to the Corporation for such coverage in the forms of Application prescribed by the Corporation.

INSURED—The term "Insured" shall mean any Applicant to whom a policy of insurance is issued by the Corporation in accordance with these Regulations.

PRODUCER—The term "Producer" shall mean (a) any authorized insurance broker or (b) any agent of a fire insurance carrier which has been appointed by the Corporation as its Fiduciary Agent, provided that such insurance broker or agent is duly licensed in accordance with the legal requirements of the State, Territory or District in which he acts as a Producer. A direct writing Mutual Company or Reciprocal Exchange appointed by the Corporation as its Fiduciary Agent may also act as a Producer and may also designate another direct writing Mutual Company or Reciprocal Exchange as a Producer, provided any such Producer so designated shall be licensed as an insurer in the jurisdiction where it acts as a Producer.

FIDUCIARY AGENT—The term "Fiduciary Agent" shall mean any insurance carrier (Capital Stock Insurance Company, Mutual Insurance Company or Reciprocal Exchange) which has been specifically appointed by the Corporation to act as its Fiduciary Agent under a "Fiduciary Agent Agreement." Each Fiduciary Agent so appointed is empowered to receive Applications and remitances covering premiums, to issue Policies, and otherwise to transact such business of the Corporation in accordance with these Regulations.

RULES

ISSUANCE OF POLICIES

RULE 1—Policies may be issued only through a Fiduciary Agent.

ONLY ONE POLICY PERMISSIBLE

RULE 2—Only one Policy shall be permitted to the Insured on any one property or group of properties, if written blanket) and only one Policy shall be permitted to the Insured for any of the following types of coverage:

1. Properties at fixed locations, and vehicles when specified (including pleasure aircraft or water craft while laid up ashore or afloat). (See Application WDC Form No. 2.)
2. Property in transit. (See Application WDC Form No. 3.)
3. Builders' risk on hulls. (See Application WDC Form No. 4.)
4. Cargo stored afloat. (See Application WDC Form No. 5.)
5. Hulls. (See Application WDC Form No. 6.)
6. Growing crops and/or orchards. (See Application WDC Form No. 7.)

APPLICATION FOR COVERAGE

RULE 3—The Applicant shall apply for insurance through any Producer, the appropriate Application forms prescribed by the Corporation. Three copies of the Application and, in any proper case, six copies of the Schedule (WDC Form No. 11) shall be signed by the Applicant. The forms of Application and Schedule shall be supplied in sets, consisting of three numbered copies of the Application (numbered 1, 2 and 3) and three attached tickets (numbered 4, 5 and 6) which correspond to the upper part of the Application. The Producer shall complete the Application and ticket forms in one operation, complete and attach the copies of the Schedule (if any), and retain the No. 3 copy of the Application. No. 1 and No. 2 copies of the Application and all three copies of the ticket shall be mailed to the Fiduciary Agent.

"Construction" and "Occupancy" classification code numbers are specified in "Appendix A" (which is made a part of these Regulations) for each class of property or risk. The Producer shall insert in the spaces provided therefor in the Application and the Schedule (if any) the proper code numbers. The Producer shall also insert in the space provided therefor in the Application and the Schedule (if any) the appropriate coinsurance percentage as explained in the Application. *Applications transmitted by the Producer to the Fiduciary Agent shall be accompanied by cash, money order, or check in full payment of the required premium. Money orders and checks shall be drawn to the order of the Fiduciary Agent to which the Application is transmitted.* The Application and the Schedule (if any), a copy of which shall be attached to and form a part of the Policy, will contain the only description of the property insured, and the Producer shall make certain that the Application contains all descriptive information required thereby.

EFFECTIVE DATE AND TERM OF INSURANCE

RULE 4—*The Producer's acceptance of the Application does not constitute a binder.* The insurance applied for shall take effect on the "Effective Date," noon standard time, at the place where the property is located, and shall terminate 12 months thereafter at the same hour. (For term of transit risk coverage, see Application WDC Form No. 3.) (For cancellation provisions, see Rule 6.) If the Application has been properly completed and is accompanied by full payment of premium, the "Effective Date" shall be the date on which the Application is received and date-stamped by the Fiduciary Agent (but in no event earlier than July 1, 1942), unless a later date is requested in the Application.

POLICY FORM AND COVERAGE

RULE 5—Insurance will be written only on the form of Policy prescribed by the Corporation. (See specimen form of Policy, WDC Form No. 1, appended to these Regulations.) The Policy will cover only direct physical loss of damage to the property insured. *The Policy does not provide consequential coverage, such as use and occupancy, rent and rental value, or coverage for other indirect losses.*

CANCELLATION

RULE 6—The Policy may be cancelled, upon the request of the Insured or the surrender of the Policy, only in case of change in ownership of the property or the Insured's interest therein. If the Policy is issued in violation of the Regulations, the Policy may be cancelled by the Corporation by delivering a

ling to the Insured and to the loss payee (if any) at the address given in the application, five days' written notice. In the event of cancellation, the pro rata Net Premium" shall be returned.

NET PREMIUM

RULE 7—The term "Net Premium" shall mean: the Gross Premium less (a) Producer's service fee (5%—subject to the minimum and maximum provided in Rule 13), and (b) the Fiduciary Agent's expense reimbursement (3½%—subject to the minimum and maximum allowable in accordance with the "Fiduciary Agent Agreement").

REDUCTION OF OR ADDITION TO POLICY AMOUNT

RULE 8—The Policy may, upon application, be reduced in amount in the event that the Insured disposes of or changes his interest in any of the property covered by the Policy and the return premium due the Insured shall be calculated on a pro rata "Net Premium" basis. The Policy may, upon application, and upon payment of the proper premium, be increased in amount, subsequent to the "Effective Date," to cover property in additional amounts or at additional locations. Reporting forms of policies will not be issued. No Producer's service fee or Fiduciary Agent's expense reimbursement shall be paid on additional premiums. No payment shall be required by or made by the Corporation where the additional or return premium is less than fifty (50) cents. (For application forms covering reductions or additions, see WDC Form Nos. 8 and 9.)

BLANKET INSURANCE

RULE 9—Where more than one property is under the same ownership whether at one or more locations, all such properties may be insured under one Policy for an amount of insurance covering blanket on all such properties, provided the Application (and the Schedule, if any) shall set forth the approximate distribution of the total coverage on all such properties according to the respective States, Territories, possessions, and coded cities of location. The rate for blanket insurance shall be the rate for the highest rated building or location. The "Pro Rata Distribution" clause in the Policy applies with respect to blanket insurance written subject to less than 90% Coinsurance.

OWNERS OF MORTGAGE OR FINANCIAL INTERESTS

RULE 10—Policies may be issued to mortgagees or other holders of security or financial interests in property eligible for coverage under these Regulations. The rate shall be determined according to these Regulations on the basis of the coded classification of the property and risks covered and the coverage shall be subject to all the conditions of the Policy. If blanket policies are issued covering mortgagee or other financial interests, the provisions of these Regulations relating to "Blanket Insurance" shall apply. (See Rule 9.)

LOSS PAYABLE CLAUSE

RULE 11—The Application forms include a loss payable provision, and in any case where the Applicant desires that payment under the Policy be made to any party in interest in addition to the Insured, the loss payable provision must be completed properly. No "mortgagee clause" will be attached to the Policy.

LOSS ADJUSTMENTS

RULE 12—In the event of loss, the Insured shall give immediate written notice to the Fiduciary Agent through which the Policy was issued, and the Insured shall comply with the provisions of the Policy relating to "Requirements in Case of Loss." Adjustment and settlement of the loss will be effected in accordance with the Corporation's established procedure.

SERVICE FEE TO PRODUCER

RULE 13—The service fee to the Producer shall not exceed 5% of the premium, with a minimum fee of \$1.00 per Policy, and a maximum fee of

\$1,000 per Policy. *The service fee shall not be deducted from the remittance which accompanies the Application.* The service fee may be paid on each Policy issued, and shall become due upon the issuance of the Policy and shall be payable on or before the 20th day of the month following. Service fees shall be paid on renewals. Service fees may be paid only to Producers. (For provisions relating to service fees in connection with additional or return premiums, see Rule No. 8.)

MINIMUM PREMIUM

RULE 14—The minimum premium shall be \$3.00 per Policy.

OTHER INSURANCE

RULE 15—The "Other Insurance" clause of the Policy provides that if there is any other insurance covering the property, whether prior to, subsequent to or simultaneous with the insurance under the Policy, which in the absence of the insurance under the Policy would cover the loss or damage covered by the Policy, then the insurance under the Policy becomes "excess insurance" and does not apply except over and above such other insurance.

REPORTING FORMS PROHIBITED

RULE 16—Reporting forms of policies will not be issued.

LIMITS OF COVERAGE FOR VESSEL PROPERTIES AND CARGOES STORED ON VESSELS

RULE 17—Insurance provided by the Corporation covers the vessels or cargo hereinafter described while confined to the limits of the harbors and other inland waters of the United States, as defined in Section 2 of the Act of Congress of February 19, 1895, and set forth in the Pilot Rules for Certain Inland Waters as issued by the Department of Commerce, or while confined to the Great Lakes (including the waterways connecting them, and their harbors and tributaries in the United States), or while confined to harbors and inland waters of the Canal Zone, Puerto Rico, Virgin Islands and Territories of Hawaii and Alaska:

- (a) Vessels used exclusively for storage, housing, manufacturing or generating power.
- (b) Pleasure craft (including vessels utilized for pleasure fishing, but excluding those employed in commercial fishing), but only while laid up afloat or ashore.
- (c) All vessels or craft while under construction until delivery by the builder or sailing on delivery or trial trip, whichever shall first occur.
- (d) Cargoes on vessels described in (a) above.

POLICY EXCLUSIONS

RULE 18—Unless otherwise specifically provided in writing thereon in accordance with these Regulations, the Policy shall not cover accounts, bills, currency, deeds, evidences of debt, securities, money, bullion, stamps, furs, jewelry, precious and semi-precious stones, works of art, statuary, paintings, pictures, etchings, antiques, stamp and coin collections, manuscripts, books and printed publications more than 50 years old, models, curiosities, objects of historical or scientific interest, pleasure water craft, pleasure aircraft, standing timber, growing crops, orchards, or any real property which is not a part of a structure or building. Provisions for coverage by separate Application or endorsement with respect to some of the foregoing excluded types of property are set forth in Rule 23, Rule 24, Rule 25, Rule 26 and Rule 27. These Regulations make no provision for insurance with respect to other excluded types of property.

RATES

RULE 19—The rates for coverage under the Policy shall be determined according to the construction classification, occupancy classification, and coinsurance

requirements, all as set forth in "Appendix A" which is made a part of these Regulations. The Producer shall determine the proper rate for the coverage applied for under the Application and shall insert such rate in the appropriate space provided on the Application and the Schedule (if any). (For provisions relating to: "Construction Codes," see Rule 20; "Occupancy Codes," see Rule 21; "Coinsurance Requirements," see Rule 22.)

CONSTRUCTION CODES

RULE 20—The Producer shall insert in the proper space on the Application and the Schedule (if any) the appropriate construction classification code number, in accordance with the construction classification code numbers set forth in "Appendix A" which is made a part of these Regulations. In the case of a risk composed of different classes of construction, if not less than 75% of the total area (including basements) is of one class of construction, the risk may be coded according to such predominating class of construction. Otherwise, such risk must take the class rate of the higher rated class of construction. The term "risk" shall mean a single building, or a group of buildings, and contents located at one location.

OCCUPANCY CODES

RULE 21—The Producer shall insert in the proper space in the Application and the Schedule (if any) the appropriate occupancy classification code number in accordance with the occupancy classification code numbers set forth in "Appendix A" which is made a part of these Regulations.

INSURANCE CLAUSE

RULE 22—The "Coinsurance" clause contained in the Policy does not apply to dwellings or farm properties, nor to the types of property described in Rule 23, Rule 24, Rule 25 and Rule 26.

COVERAGE FOR COMMERCIAL FURS, JEWELRY, ART OBJECTS, AND THE LIKE

RULE 23—Furs and jewelry of commercial dealers, and works of art, statuary, paintings, pictures, etchings, antiques, stamp and coin collections, manuscripts, books and printed publications more than 50 years old, models, curiosities, and objects of historical or scientific interest, when owned by commercial dealers, natural institutions, or, when open for public display, by private persons, may be specifically covered, provided the Application or the Schedule attached thereto sets forth separately the description, location and the amount of coverage of the property to be so covered. The limit of coverage shall be \$5,000 for any one article and the limits of coverage for any one interest at any one location shall be as follows:

Works of art, statuary, paintings, etchings, pictures, and antiques	\$100,000
Jewelry	\$100,000
Furs	\$100,000
Stamp and Coin Collections, manuscripts, and books and printed publications more than 50 years old.....	\$100,000
Models, curiosities, and objects of historical or scientific interest.....	\$100,000

In any such case the Fiduciary Agent shall attach to the Policy a separate endorsement (or endorsements) extending the coverage of the Policy to include each type of such property so listed in the Application and/or the Schedule, subject to the foregoing limits of coverage. Such endorsement shall also state that the "Coinsurance" clause and "Pro Rata Distribution" clause, both of which are a part of the Policy, shall not be applicable to the property covered under the endorsement. Such endorsement shall be in the form set forth in Rule 27.

COVERAGE FOR PRIVATELY OWNED FURS, JEWELRY, ART OBJECTS AND THE LIKE

RULE 24—Furs, jewelry, works of art, statuary, paintings, pictures, etchings, antiques, stamp and coin collections, manuscripts, books and printed publications more than 50 years old, models, curiosities, and objects of historical and scientific interest, when privately owned, may be specifically covered, provided the Application or the Schedule attached thereto sets forth separately the description, location and the amount of coverage of the property to be so covered. The limits of coverage shall be \$5,000 for any one article and a total of \$10,000 for any interest with respect to any and all of the foregoing types of property. In such case the Fiduciary Agent shall attach to the Policy a separate endorsement (or endorsements) extending the coverage of the Policy to include each type of such property so listed in the Application and/or the Schedule, subject to the foregoing limits of coverage. Such endorsement shall also state that the "Coinsurance" clause and "Pro Rata Distribution" clause, both of which are a part of the Policy, shall not be applicable to the property covered under the endorsement. Such endorsement shall be in the form set forth in Rule 27.

COVERAGE FOR PLEASURE WATER CRAFT AND PLEASURE AIRCRAFT

RULE 25—Pleasure water craft and pleasure aircraft may be specifically covered while laid up ashore or afloat provided the Application or the Schedule attached thereto sets forth separately the description, location and the amount of coverage of the property to be so covered. The limit of coverage shall be \$10,000 for any one craft. In any such case the Fiduciary Agent shall attach to the Policy a separate endorsement (or endorsements) extending the coverage of the Policy to include each type of such property so listed in the Application, subject to the foregoing limit of coverage. Such endorsement shall also state that the "Coinsurance" clause and "Pro Rata Distribution" clause, both of which are a part of the Policy, shall not be applicable to the property covered under the endorsement. Such endorsement shall be in the form set forth in Rule 27.

COVERAGE FOR GROWING CROPS AND ORCHARDS

RULE 26—Growing crops and orchards may be specifically covered, provided the separate form of Application for insurance covering growing crops and orchards is completed by the Applicant. The limit of coverage shall be \$100,000 for any one interest.

FORM OF ENDORSEMENT FOR EXCLUDED PROPERTY

RULE 27—All endorsements attached to the Policy for coverage pursuant to the provisions of Rule 23, Rule 24, or Rule 25, shall be in the following form:

"This policy is hereby extended to cover

(Insert description of property)

subject to a limit of loss not exceeding \$..... for any one article (craft). The "Coinsurance" clause and the "Pro Rata Distribution" clause contained in this policy are not applicable to the property covered by this endorsement. All other terms and conditions of this policy remain unchanged.

"....."
(Authorized Fiduciary Agent)

"By....."

The dollar amount which shall be inserted in the blank space of the foregoing form of endorsement shall be the amount of coverage applicable to the property described in such endorsement, or the limit of coverage specified in Rule 23, Rule 24, or Rule 25, as the case may be, whichever is the lesser.

EXPLANATION OF PRO RATA DISTRIBUTION CLAUSE

RULE 28—The effect of the "Pro Rata Distribution" clause is to distribute proportionately the amount of insurance where more than one building, structure or place is covered under one blanket amount. This clause has the effect of apportioning the total amount of the insurance in the proportion that the value of each building, structure or place bears to the total value of all buildings, structures or places insured. The following is an illustration:

If there is \$100,000 worth of merchandise in two buildings, and blanket insurance is in force in the amount of \$50,000, and if the value is distributed between the two buildings as follows:

In building A—Value	\$ 75,000
In building B—Value.....	25,000
	<hr/>
Total Value	\$100,000

The "Pro Rata Distribution" clause distributes the \$50,000 insurance as follows:

75/100 of \$50,000 in Building A.....	\$37,500
25/100 of \$50,000 in Building B.....	\$12,500

In other words, the effect of the "Pro Rata Distribution" clause is the same as if the property owner had carried insurance under two specific items, one for \$37,500 covering in building A, and one for \$12,500 covering in building B, instead of the one \$50,000 blanket amount.

EXPLANATION OF COINSURANCE CLAUSE

RULE 29—The effect of the "Coinsurance" clause is to assess equitably the cost of the insurance. The following is one illustration:

Value	\$10,000
Insurance required by (50%) Coinsurance Clause.....	5,000
Insurance actually carried	5,000
Loss	1,000

In this case, the property owner has carried sufficient insurance to comply with the 50% "Coinsurance" clause and, therefore, the loss of \$1,000 would be paid in full.

The following is another illustration:

Value	\$10,000
Insurance required by (50%) Coinsurance Clause.....	5,000
Insurance actually carried.....	2,500
Loss	1,000

In this case, since the property owner has carried only one-half of the required amount of insurance, he would collect but one-half of his loss. The property owner would then recover only 50% of his loss, or \$500.

In the case of a total loss under either illustration, the property owner would collect the face amount of the policy.

RATE SCHEDULE—See pages 2 to 5 inclusive.

CONSTRUCTION CODE

For the purpose of determining rates for coverage, risks shall be coded as to construction as follows:

Coverage on or in buildings or structures of fire resistive construction according to fire insurance standards..... Code 1

Coverage on or in buildings or structures of any other construction, and property in the open..... Code 2

In the case of a risk composed of different classes of construction, if not less than 75% of the total floor area (including basements) is of one class of construction, the risk may be coded according to such predominating class of construction. Otherwise, such risk must take the class rate of the higher rated class of construction. (See Rule 20.)

(The term "risk" as used herein may be construed to mean a single building, or a group of buildings, and contents situated at one location.)

COINSURANCE CREDITS

Rates are based upon the use of the 50% Coinsurance clause, which is the minimum permissible, except as otherwise specifically provided herein:

For 80% Coinsurance clause, deduct 30% from the base rate.

For 90% Coinsurance clause, deduct 35% from the base rate.

For 100% Coinsurance clause, deduct 40% from the base rate.

SPRINKLER CREDIT

If not less than 75% of the total floor area (including basements) of the risk is equipped with a system of automatic sprinklers, deduct 10% from the base rate.

BLANKET POLICIES

Blanket policies take the rate of the highest rated building or location. (See Rule 9.)

Rate Schedule

RATES ARE FOR BUILDING AND CONTENTS UNLESS OTHERWISE NOTED

MINIMUM PREMIUM OF \$3.00 PER POLICY

	Occupancy Code Number	Construction Code Number	ANNUAL RATES PER \$100 OF INSURANCE	With Coinsurance of			
				No Coinsurance	50%	80%	90%
					Coinsurance does not apply		
NS—without automatic sprinklers S—with automatic sprinklers				.10	Coinsurance does not apply		
Dwellings and their contents..... (Dwellings comprising less than five family units including private garages, out-buildings and private passenger automobiles.) (Use Application WDC Form No. 2.)	01	1 or 2			Coinsurance does not apply		
Farm properties and their contents..... (Farm property and their contents shall include private garages, private barns and out-buildings, farm implements, live stock, and motor vehicles used for farm or pleasure purposes.) (Use Application WDC Form No. 2.)	02	1 or 2		.10	Coinsurance does not apply		
Churches, hospitals, educational or cultural institutions, libraries, museums, public buildings (Use Application WDC Form No. 2.)	NS 03 S 03 NS 03 S 03	1 1 2 2		— — — —	.10 .09 .15 .135	.07 .063 .105 .095	.065 .059 .098 .088
							.06 .054 .09 .081
Apartment, hotels, offices, mercantiles, warehouses and other buildings not used for manufacturing (Use Application WDC Form No. 2.)	NS 04 S 04 NS 04 S 04	1 1 2 2		— — — —	.15 .135 .20 .18	.105 .095 .14 .126	.098 .088 .117 .108
							.09 .081 .12 .108
Manufacturing plants, piers, wharves, bridges, and structures not otherwise specifically provided for (Use Application WDC Form No. 2.)	NS 05 S 05 NS 05 S 05	1 1 2 2		— — — —	.20 .18 .30 .27	.14 .126 .21 .189	.13 .117 .195 .176
							.12 .108 .18 .162

**RATES ARE FOR BUILDING AND CONTENTS
UNLESS OTHERWISE NOTED**

**MINIMUM PREMIUM OF \$3.00
PER POLICY**

	Occupancy Code Number	Construction Code Number	ANNUAL RATES PER \$100 OF INSURANCE				
			No Coinsurance	With Coinsurance of			
				50%	80%	90%	100%
NS—without automatic sprinklers S—with automatic sprinklers							
Street railway and railroad properties (except trackage and roadbeds and rolling stock and their contents.) (Use Application WDC Form No. 2.)	NS 06 S 06	1 or 2 1 or 2	— —	.30 .27	.21 .189	.195 .176	.18 .162
Rolling stock (Use Application WDC Form No. 2.)	07	—	—	.25	.175	.163	.15
Trackage and road beds (Use Application WDC Form No. 2.)	08	—	—	.10	.07	.065	.06
Builders' risk shall take the rate applicable to the completed building or structure (Use Application WDC Form No. 2.)							
Floater policies shall cover movable property, at any location, but shall not cover while in transit.) (Use Application WDC Form No. 2.)	09	—	100% Coinsurance		Mandatory		.25
Motor vehicles, except those hereinabove provided for under Dwellings and Farm Properties (Use Application WDC Form No. 2.)	10	—	—	.25	.175	.163	.15
Growing crops and orchards (Use Application WDC Form No. 7.)	11	—	—				

Transit Risks (Use Application WDC Form No. 3.)	12	—	.05	Coinsurance does not apply
Insurance to be applied for on the basis of:				
(a) the highest of items (a), (b), and (c) of the Application in the case of a 12 months' policy; or				
(b) item (d) of the Application in the case of a 3 months' policy issued to an applicant who has been in business for less than 3 months; or				
(c) item (e) of the Application in the case of a trip risk.				
Vessels:				
Commercial hulls—All metal (including hull, deck and superstructure)	13	1	.50	Coinsurance does not apply
Others..... (Use Application WDC Form No. 6.)	13	2	.75	Coinsurance does not apply
Builders' risk—All Metal (including hull, deck and superstructure)	13	1	.25	Coinsurance does not apply
Others..... (Use Application WDC Form No. 4.)	13	2	.375	Coinsurance does not apply
(Premiums calculated on completed price.)				
Cargo Stored Afloat:				
All Metal (including hull, deck, and superstructure)	13	1	.50	Coinsurance does not apply
Others (Use Application WDC Form No. 5.)	13	2	.75	Coinsurance does not apply
Publicly or privately owned utilities, such as light, water, heat, power and communication systems, including transmission lines, underground piping, wiring and conduits. (Use Application WDC Form No. 2.)	14	1 or 2	—	.30 .21 .195 .18
Furs, jewelry, art objects, and the like. (Use Application WDC Form No. 2.)	15	1 or 2	.75	Coinsurance does not apply
Pleasure aircraft or pleasure water craft. (Use Application WDC Form No. 2.)	16	1 or 2	—	.25 .175 .163 .15

Coded City, State, Territory and Possessions Codes

ALABAMA	01 Birmingham	NEVADA	47
	02 Remainder of state	NEW HAMPSHIRE ...	48
ALASKA	03	NEW JERSEY	49 Jersey City
ARIZONA	04		50 Newark
ARKANSAS	05		51 Remainder of state
CALIFORNIA	06 Los Angeles	NEW MEXICO	52
	07 Oakland	NEW YORK	53 Buffalo
	08 San Francisco		54 New York City
	09 Remainder of state		55 Rochester
COLORADO	10 Denver		56 Remainder of state
	11 Remainder of state	NORTH CAROLINA ..	57
CONNECTICUT	12	NORTH DAKOTA	58
DELAWARE	13	OHIO	59 Cincinnati
DISTRICT OF			60 Cleveland
COLUMBIA	14		61 Columbus
FLORIDA	16		62 Toledo
GEORGIA	17 Atlanta		63 Remainder of state
	18 Remainder of state	OKLAHOMA	64
HAWAIIAN ISLANDS	19	OREGON	65 Portland
IDAHO	20		66 Remainder of state
ILLINOIS	21 Chicago	PANAMA CANAL	
	22 Remainder of state	ZONE	67
INDIANA	23 Indianapolis	PENNSYLVANIA ...	68 Philadelphia
	24 Remainder of state		69 Pittsburgh
IOWA	25		70 Remainder of state
KANSAS	26	PUERTO RICO	71
KENTUCKY	27 Louisville	RHODE ISLAND	72 Providence
	28 Remainder of state		73 Remainder of state
LOUISIANA	29 New Orleans	SOUTH CAROLINA ..	74
	30 Remainder of state	SOUTH DAKOTA	75
MAINE	31	TENNESSEE	76 Memphis
MARYLAND	32 Baltimore		77 Remainder of state
	33 Remainder of state	TEXAS	78 Dallas
MASSACHUSETTS ...	34 Boston		79 Houston
	35 Remainder of state		80 San Antonio
MICHIGAN	36 Detroit		81 Remainder of state
	37 Remainder of state	UTAH	82
MINNESOTA	38 Minneapolis	VERMONT	83
	39 St. Paul	VIRGINIA	84
	40 Remainder of state	VIRGIN ISLANDS ...	85
MISSISSIPPI	41	WASHINGTON	86 Seattle
MISSOURI	42 Kansas City		87 Remainder of state
	43 St. Louis	WEST VIRGINIA ...	88
	44 Remainder of state	WISCONSIN	89 Milwaukee
MONTANA	45		90 Remainder of state
NEBRASKA	46	WYOMING	91
BLANKET	99 (Allocate by cities and States)	FLOATERS	15

No.

War Damage Corporation

(A corporation created by Reconstruction Finance Corporation pursuant to Section 53 of the Reconstruction Finance Corporation Act, as amended, herein called the "Corporation")

WASHINGTON, D. C.

1 ISSUED TO:
(herein called the "Insured")

2 Mail address:

3 Effective date:

4 **In Consideration** of the payment of the premium, the Corporation agrees to indemnify the Insured, and
5 legal representatives, against direct physical loss of or damage to the property described in the attached application
6 which may result from **ENEMY ATTACK INCLUDING ANY ACTION TAKEN BY THE MILITARY, NAVAL**
7 **OR AIR FORCES OF THE UNITED STATES IN RESISTING ENEMY ATTACK.**

8 This insurance shall take effect on the effective date herein stated, at noon, standard time, at the place
9 where the property is located, and shall terminate twelve months thereafter, at the same hour.

10 The representations, terms and conditions of the application attached hereto shall be a part of this policy, and,
11 except as otherwise herein provided, this policy shall cover the property described in the application, for the amounts
12 therein stated, while located at the place(s) stated in the application, but not elsewhere.

13 Assignment of this policy shall not be valid except with the written consent of the Corporation.

14 The provisions printed on the following pages are made a part of this policy, and this policy shall also be
15 subject to such other provisions, stipulations and agreements as may be added hereto, over the signature of a duly
16 authorized Fiduciary Agent.

17 **In Witness Whereof**, the Corporation has executed this policy, but this policy shall not be valid unless
18 countersigned by a duly authorized Fiduciary Agent of the Corporation.

19
Attest: *A. T. Loken*
Secretary

WAR DAMAGE CORPORATION
M. Clayton
President

20 Countersigned this day of, 19.....

21
(Authorized Fiduciary Agent)

22 By.....

23 AMOUNT OF**24 LOSS**

25
26 of the Insured therein at the time of loss, nor the
27 amount it would cost to repair or replace the property
28 with material of like kind and quality within a reason-
29 able time after the loss. No allowance shall be
30 made for compensation for loss of use, loss of
31 profits, loss resulting from delay or deterioration,
32 loss or impairment of market, cessation of work, fixa-
33 ture of price or value, interruption of business or manufac-
34 ture or occupancy, or for consequential loss. No allowance
35 shall be made for any increased cost of repair or recon-
36 struction by reason of any ordinance or law regulating
37 construction, use or repair.

38 CONCEALMENT**39 OR FRAUD**

40
41 This policy shall be void if,
42 whether before or after a loss,
43 the Insured has wilfully con-
44 cealed or misrepresented any material fact or circum-
45 stance concerning this insurance or the subject thereof,
46 or the interest of the Insured therein, or in case
47 of any fraud or false swearing by the Insured relating
48 thereto.

49 PROPERTY**50 EXCLUDED**

51 Unless specifically provided in
52 writing herein, this policy shall
53 not cover accounts, bills, cur-
54 rency, deeds, evidences of debt, securities, money, bullion,
55 stamps, furs, jewelry, precious and semi-precious stones,
56 works of art, statuary, paintings, pictures, etchings,
57 antiques, stamp and coin collections, manuscripts, books
58 and printed publications more than 50 years old, models,
59 curiosities, objects of historical or scientific interest, plants,
60 water craft, pleasure aircraft, standing timber, growing
61 crops, orchards, or any real property which is not a part
62 of a structure or building.

63 PREMIUM

64 The premium required by the
65 regulations of the Corporation
66 shall be paid in full prior to the effective date. If a check is
67 tendered in payment of premium and a check is not hon-
68 ored upon presentation for the full amount thereof, this
69 policy shall be void.

70 PERILS NOT**71 COVERED**

72 The Corporation shall not be
73 liable for loss caused directly
74 or indirectly by:
75 (a) blackout; burglary; robbery; theft; larceny; pillage or
76 looting; sabotage; vandalism; or malicious mischief; or
77 (b) neglect of the Insured to use all reasonable means
78 to save and preserve the property after damage resulting
79 from the perils herein covered.

80 PRO RATA

81 If any item of insurance covers
82 blanket in or on more than one
83 building, structure or place, the
84 amount of insurance under such item shall attach in or on
85 each building, structure or place in that proportion which
86 the value of the property in or on each said building, struc-
87 ture or place shall bear to the value of all of the property
88 covered by such blanket item.

89 This pro rata distribution clause shall not apply if this
90 policy is subject to 90% or 100% coinsurance.

91 COINSURANCE

92 The Corporation shall not be
93 liable for a greater proportion
94 of any loss than the amount of insurance under this policy
95 bears to the stipulated percentage of the actual cash value
96 of the property described in the application at the time when
97 such loss occurs. The stipulated percentage shall be

88 the percentage of coinsurance stated in the application. If
89 the claim for loss is both less than \$10,000 and less than
90 25% of the total amount of insurance upon the property de-
91 scribed in the application, at the time such loss occurs, no
92 special inventory or appraisal of the undamaged prop-
93 erty shall be required, and if the property described in
94 the application consists of two or more items, the provisions
95 of this paragraph shall apply to each item separately.

96 The provisions of this coinsurance clause shall not apply to
97 dwellings comprising less than five family units, nor to farm
98 properties.

99 OTHER INSURANCE

100 If there is any other insurance
101 covering the property insured
102 hereunder, whether prior to, subsequent to, or simultaneous
103 with this insurance, which in the absence of this insurance
104 would cover the loss or damage hereby covered, then the
105 Corporation shall not be liable hereunder for more than the
106 excess over and above such other insurance.

107 MORTGAGE OR**108 OTHER INTERESTS**

109 If the application provides that
110 loss hereunder shall be payable
111 in whole or in part to a payee
112 other than the Insured, and the Insured fails to render proof
113 of loss within the time required by this policy, such payee
114 shall, upon notice, as if named as the Insured herein, render
115 proof of loss as herein specified within sixty days thereafter,
116 and shall be subject to the provisions hereof as to examina-
117 tion under oath, appraisal, time of payment, and bringing suit.

118 CANCELLATION

119 This policy may be cancelled
120 upon the request of the Insured
121 and surrender of this policy, only in case of change in own-
122 ership of the property, or in the Insured's interest therein.
123 If this policy be issued in violation of the regulations
124 of the Corporation in effect at the time of issuance,
125 this policy may be cancelled by the Corporation by
126 delivering or mailing five days' written notice to the Insured,
127 and to the loss payee, if any, at the address given in the
128 application. In the event of cancellation, the net premium
129 shall be prorated and returned in conformity with the reg-
130 ulations of the Corporation.

131 REQUIREMENTS IN**132 CASE OF LOSS**

133 In the event of loss, the Insured
134 shall give immediate written
135 notice to the Corporation, fur-
136 nish a complete inventory of the destroyed, damaged and
137 undamaged property, stating the quantity, cost and actual
138 cash value of each article and the amount claimed thereon,
139 and file with the Corporation a proof of loss within 60 days
140 after the loss, unless such time is extended by the Corpora-
141 tion in writing. Such proof of loss, signed and sworn to
142 by the Insured, shall state the Insured's knowledge and be-
143 lief as to the time and origin of the loss, the interest
144 of the Insured and all others in the property, the actual
145 cash value of each item thereof and the amount of loss
146 thereto, and all contracts of insurance covering any of such
147 property. If required, the Insured shall furnish verified
148 plans and specifications of any buildings, fixtures or machin-
149 ery destroyed or damaged; as often as may be required, ex-
150 hibit to any person designated by the Corporation all that
151 remains of any property herein covered; submit to examina-
152 tions under oath by any person named by the Corporation
153 and subscribe the same; and, as often as may be required,
154 produce for examination all books of account, bills, invoices
155 and other vouchers, or certified copies thereof, if originals
156 be lost, at such reasonable time and place as may be des-
157 ignated by the Corporation, and permit extracts and copies
158 thereof to be made.

(Continued on Page 4)

ATTACH APPLICATION AND ENDORSEMENT HERE

Page 4

153 APPRAISAL

154 In case the Insured and the Corporation fail to agree as to
 155 the actual cash value or the amount of loss, then, on
 156 the written demand of either, each shall select a competent
 157 and disinterested appraiser and notify the other of the ap-
 158 praiser selected within twenty days after such demand. The
 159 appraisers shall first select a competent and disinterested
 160 umpire, and, in the event of their failure within fifteen days
 161 to agree upon such umpire, then, on request of the Insured
 162 or the Corporation, such umpire shall be selected by a Judge
 163 of a Federal Court of the district in which the property is
 164 located. The appraisers shall then appraise the loss, stating
 165 separately actual cash value and loss to each item; and,
 166 failing to agree, shall submit their differences, only, to the
 167 umpire. An award in writing, so itemized, of any two when
 168 filed with the Corporation shall determine the amount of
 169 actual cash value and loss. Each appraiser shall be paid by
 170 the party selecting him and the expenses of appraisal and
 171 the umpire shall be paid by the parties equally.

172 CORPORATION'S

173 OPTIONS

174 It shall be optional with the Corporation to take all or any part of the property at the
 175 agreed value, and also to repair, rebuild, or replace the
 176 property destroyed or damaged with other of like kind and
 177 quality within a reasonable time on giving notice of its in-
 178 tentions so to do within thirty days after the receipt of the
 179 proof of loss; but there can be no abandonment to the Cor-
 180 poration of any property.

181 PAYMENT OF LOSS

182 Any loss shall be payable thirty days after proof of loss, as
 183 herein provided, is received by the Corporation and ascer-

184 tainment of the loss is made either by agreement between the
 185 Insured, mortgagee or loss payee, if any, and the Corpora-
 186 tion, expressed in writing, or by the filing with the Corpora-
 187 tion of an award as herein provided, and if the loss shall be
 188 payable to a payee other than the Insured, the amount of any
 189 loss shall be payable to such payee as interest may appear.

190 SUIT

191 No suit or action for recovery of any claim, shall be sustain-
 192 able in any court of law or equity unless all the require-
 193 ments of this policy shall have been complied with, or un-
 194 less commenced within twelve months after the date of loss.

195 SUBROGATION

196 The Corporation may require from the Insured an assignment
 197 of all right of recovery against any party for loss to the
 198 extent that payment therefor is made by the Corporation.

199 WAIVER

200 No permission affecting this insurance shall exist, or waiver
 201 of any provision be valid, unless granted herein or expressed
 202 in writing adopted hereto. No provision, stipulation or for-
 203 feiture shall be held to be waived by any requirement or
 204 proceedings on the part of the Corporation relating to ap-
 205 praisal or to any examination provided for herein.

206 EXTENSION

207 OF TIME If the Insured is unable to comply with any of the provisions of this policy applicable to a
 208 loss because of enemy action, occupation or control, the
 209 Insured's right of recovery shall not be prejudiced, provided
 210 the Insured shall comply with such provisions within a
 211 reasonable time after the Insured becomes able to do so,
 212 but in no event later than six months thereafter.

The Reconstruction Finance Corporation Act, as amended, provides:

SEC. 16. (a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security therefor, or for the purpose of influencing in any way the action of the corporation, or for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both.

DEFENDANT'S EXHIBIT B

War Damage Corporation

RESOLUTION

Be It Resolved, That War Damage Corporation, deeming advisable the following general exceptions to the protection authorized under Section 5g of the Reconstruction Finance Corporation Act, as amended (Public Law No. 506, 77th Congress):

1. Does except from such protection (a) all accounts, bills, currency, deeds, evidences of debt, securities, money, bullion, stamps, precious and semi-precious stones, works of art, antiques, stamp and coin collections, manuscripts, models, curiosities, objects of historical and scientific interest, pleasure water-craft and pleasure aircraft, and standing timber, not specifically listed or designated as insured under a policy of insurance issued by this Corporation (b) all property interests of an "enemy" or an "ally of an enemy" as defined in the Trading with the Enemy Act, as amended, or of an alien enemy, wherever resident, or of any person or persons, real or juridical, whose names are contained in the Proclaimed List of Certain Blocked Nationals, as amended, unless legally protected under a policy of insurance issued by this Corporation; (c) all furs and jewelry not specifically listed or designated as insured under a policy issued by this Corporation, except furs and jewelry of any claimant or policyholder to an aggregate value not exceeding \$1,000.

2. Does except from any and all protection under said Act the following:

- (a) all intangible property (other than securities insured under a policy of insurance issued by this Corporation);
- (b) all real property (other than standing timber, growing crops and orchards) not a part of a building or structure.
- (c) all cargo on ocean-going, coastwise, inter-coastal, or overseas vessels, whether in the ports or inland or coastal waters of the United States, the Philippine Islands, the Canal Zone, or the Territories or possessions of the United States or otherwise (except cargo damaged or destroyed before July 1, 1942, by enemy attack while in transit between points located in any of the foregoing), and all goods and property which are or have been diverted to, detained at, or unloaded, landed, or stored within, the United States, the Philippine Islands, the Canal Zone, or the Territories or possessions of the United States while in transit by sea to or from a foreign port, so long as such goods shall be detained or prevented from proceeding to their ultimate destinations as designated in the applicable ocean bills of lading or shipping documents;
- (d) all vessels and water-craft wherever situated (and their tackle, apparel, fittings, equipment, stores, ordnance, boilers and machinery), other than (a) vessels used exclusively for storage, housing,, manufac-

turing or generating power, (b) vessels while under construction, until delivery by the builder or sailing on delivery or trial trip, whichever shall first occur, and (c) pleasure water-craft while laid up afloat or ashore, which are subject to protection within the limits indicated in paragraphs "1" and "E" of this resolution;

- (e) all loss or damage caused directly or indirectly by neglect of the insured, or of the claimant (as the case may be) to use all reasonable means to save and preserve the property after damage;
- (f) all interest of foreign nationals in property located, at the time of loss, otherwise than within the United States, the Canal Zone, or the Territories or possessions of the United States;
- (g) all other classes of property heretofore generally excepted by this Corporation, with the approval of the Secretary of Commerce, from the protection authorized by said Act; all claims with respect to which notice of loss and proof of claim have not been or shall not be presented to and filed with this Corporation in accordance with its regulations as from time to time promulgated and in effect; and all claims not proved and established to the satisfaction of the Corporation; the Corporation reserving the right to except from the protec-

tion authorized by the Act such other classes of property as it shall deem advisable.

Be It Resolved Further, That

A. All property insured against war risks by insurers other than this Corporation be, and the same is excepted from protection under the said Act in any amount greater than the excess of the fair cash value of such property over and above the amount of such other insurance, whether collectible or not.

B. Works of art, antiques, stamp and coin collections, manuscripts, books and printed publication more than 50 years old, models, curiosities, and objects of historical or scientific interest owned by commercial dealers, cultural institutions or persons who keep the same open for public display, are excepted from protection under the said Act otherwise than in an amount not exceeding \$25,000 for anyone article of any of the classes in this paragraph "B" described, as well as conditionally excepted from protection as provided in paragraph "1" of this resolution.

C. Furs, jewelry, works of art, antiques, stamp and coin collections, manuscripts, books and printed publications more than 50 years old, models, curiosities, and objects of historical or scientific interest, when privately owned and not open for public display, are excepted from protection under the said Act otherwise than in an amount not exceeding \$5,000 for any one article of any of the classes in this paragraph "C" described, and not exceeding a

total of \$10,000 for any one interest with respect to any or all of the aforementioned classes of property wherever located, as well as conditionally excepted from protection as provided in paragraph "1" of this resolution.

D. Records, accounts, plans, drawings and formulae are excepted from protection under the said Act otherwise than in an amount not exceeding \$10,000 for any one film, copy, record, account, plan, drawing or formula, as well as conditionally excepted from protection to the extent provided in paragraph "1" of this resolution.

E. Pleasure water-craft while laid up afloat or ashore and pleasure aircraft are excepted from protection under the said Act otherwise than in an amount not exceeding \$10,000 for any one craft, as well as conditionally excepted from protection as provided in paragraph "1" of this resolution.

* * * * *

The foregoing resolution was duly adopted by the Executive Committee of War Damage Corporation on October 2, 1944.

-----,
Secretary.

DEFENDANT'S EXHIBIT C

WDC Form No. 1, July, 1942. No.....

War Damage Corporation

(A corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, herein called the "Corporation.")

Washington, D. C.

[Stamped]: Specimen.

Issued to.....(herein called the "Insured")

Mail address:.....

Effective date:.....

In Consideration of the payment of the premium, the Corporation agrees to indemnify the Insured, and legal representatives, against direct physical loss of or damage to the property described in the attached application which may result from Enemy Attack Including Any Action Taken by the Military, Naval or Air Forces of the United States in Resisting Enemy Attack.

This insurance shall take effect on the effective date herein stated, at noon, standard time, at the place where the property is located, and shall terminate twelve months thereafter, at the same hour.

The representations, terms and conditions of the application attached hereto shall be a part of this policy, and, except as otherwise herein provided, this policy shall cover the property described in the application, for the amounts therein stated, while located at the place(s) stated in the application, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of the Corporation.

The provisions printed on the following pages are made a part of this policy, and this policy shall also be subject to such other provisions, stipulations and agreements as may be added hereto, over the signature of a duly authorized Fiduciary Agent.

In Witness Whereof, the Corporation has executed this policy, but this policy shall not be valid unless countersigned by a duly authorized Fiduciary Agent of the Corporation.

WAR DAMAGE CORPORATION,
/s/ N. L. CLAYTON,
President.

Attest:

A. T. HOBSON,
Secretary.

Countersigned this.....day of....., 19....

.....,
(Authorized Fiduciary Agent)

By.....

Amount of Loss

The amount of loss shall not exceed the actual cash value of the property nor the interest of the Insured therein at the time of loss, nor the amount it would cost to repair or replace the property with material of like kind and quality within a reasonable time after the loss. No allowance shall be made for compensation for loss of use, loss of profits, loss resulting from delay or deterioration, loss or im-

pairment of market, cessation of work, fixation of price or value, interruption of business or manufacture or occupancy, or for consequential loss. No allowance shall be made for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction, use or repair.

Concealment or Fraud:

This policy shall be void if, whether before or after a loss, the Insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the Insured therein, or in case of any fraud or false swearing by the Insured relating thereto.

Property Excluded:

Unless specifically provided in writing hereon, this policy shall not cover accounts, bills, currency, deeds, evidences of debt, securities, money, bullion, stamps, furs, jewelry, precious and semi-precious stones, works of art, statuary, paintings, pictures, etchings, antiques, stamp and coin collections, manuscripts, books and printed publications more than 50 years old, models, curiosities, objects of historical or scientific interest, pleasure water-craft, pleasure aircraft, standing timber, growing crops, orchards, or any real property which is not a part of a structure or building.

Premium:

The premium required by the regulations of the Corporation shall be paid in full prior to the effec-

tive date. If a check is tendered in payment of premium and such check is not honored upon presentation for the full amount thereof, this policy shall be void.

Perils Not Covered:

The Corporation shall not be liable for loss caused directly or indirectly by:

(a) blackout; burglary, robbery, theft, larceny, pillage or looting, sabotage, vandalism or malicious mischief; or

(b) neglect of the Insured to use all reasonable means to save and preserve the property after damage resulting from the perils herein covered.

Pro Rata Distribution:

If any item of insurance covers blanket in or on more than one building, structure or place, the amount of insurance under such item shall attach in or on each building, structure or place in that proportion which the value of the property in or on each said building, structure or place shall bear to the value of all of the property covered by such blanket item.

This pro rata distribution clause shall not apply if this policy is subject to 90 per cent or 100 per cent coinsurance.

Coinsurance:

The Corporation shall not be liable for a greater proportion of any loss than the amount of insurance under this policy bears to the stipulated percentage of the actual cash value of the property described in

the application at the time when such loss occurs. The stipulated percentage shall be the percentage of coinsurance stated in the application. If the claim for loss is both less than \$10,000 and less than 2 per cent of the total amount of insurance upon the property described in the application, at the time such loss occurs, no special inventory or appraisal of the undamaged property shall be required, and if the property described in the application consists of two or more items, the provisions of this paragraph shall apply to each item separately.

The provisions of this coinsurance clause shall not apply to dwellings comprising less than five family units, nor to farm properties.

Other Insurance:

If there is any other insurance covering the property insured hereunder, whether prior to, subsequent to, or simultaneous with this insurance, which in the absence of this insurance would cover the loss or damage hereby covered, then the Corporation shall not be liable hereunder for more than the excess over and above such other insurance.

Mortgage or Other Interests:

If the application provides that loss hereunder shall be payable in whole or in part to a payee other than the Insured, and the Insured fails to render proof of loss within the time required by this policy, such payee shall, upon notice, as if named as the Insured herein, render proof of loss as herein speci-

fied within sixty days thereafter, and shall be subject to the provisions hereof as to examination under oath, appraisal, time of payment, and bringing suit.

Cancellation:

This policy may be cancelled upon the request of the Insured and surrender of this policy, only in case of change in ownership of the property, or in the Insured's interest therein. If this policy be issued in violation of the regulations of the Corporation in effect at the time of issuance, this policy may be cancelled by the Corporation by delivering or mailing five days' written notice to the Insured, and to the loss payee, if any, at the address given in the application. In the event of cancellation, the net premium shall be prorated and returned in conformity with the regulations of the Corporation.

Requirements in Case of Loss:

In the event of loss, the Insured shall give immediate written notice to the Corporation, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity, cost and actual cash value of each article and the amount claimed thereon, and file with the Corporation a proof of loss within 60 days after the loss, unless such time is extended by the Corporation in writing. Such proof of loss, signed and sworn to by the Insured, shall state the Insured's knowledge and belief as to the time and origin of the loss, the interest of the Insured and all others in the property, the actual cash value of each item thereof and the

amount of loss thereto, and all contracts of insurance covering any of such property. If required, the Insured shall furnish verified plans and specifications of any buildings, fixtures or machinery destroyed or damaged; as often as may be required, exhibit to any person designated by the Corporation all that remains of any property herein covered; submit to examination under oath by any person named by the Corporation and subscribe the same; and, as often as may be required, produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by the Corporation, and permit extracts and copies thereof to be made.

Appraisal:

In case the Insured and the Corporation fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select competent and disinterested appraiser and notify the other of the appraiser selected within twenty days after such demand. The appraisers shall first select a competent and disinterested umpire, and, in the event of their failure within fifteen days to agree upon such umpire, then, on request of the Insured or the Corporation, such umpire shall be selected by a Judge of a Federal Court of the district in which the property is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only,

to the umpire. An award in writing, so itemized, of any two when filed with the Corporation shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and the umpire shall be paid by the parties equally.

Corporation's Options:

It shall be optional with the Corporation to take all or any part of the property at the agreed value, and also to repair, rebuild, or replace the property destroyed or damaged with other of like kind and quality within a reasonable time on giving notice of its intention so to do within thirty days after the receipt of the proof of loss; but there can be no abandonment to the Corporation of any property.

Payment of Loss:

Any loss shall be payable sixty days after proof of loss, as herein provided, is received by the Corporation and ascertainment of the loss is made either by agreement between the Insured, mortgagee or loss payee, if any, and the Corporation, expressed in writing, or by the filing with the Corporation of an award as herein provided, and if the loss shall be payable to a payee other than the Insured, the amount of any loss shall be payable to such payee as interest may appear.

Suit:

No suit or action for recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been

complied with, or unless commenced within twelve months after the date of loss.

Subrogation:

The Corporation may require from the Insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by the Corporation.

Waiver:

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirements or proceeding on the part of the Corporation relating to appraisal or to any examination provided for herein.

Extension of Time:

If the Insured is unable to comply with any of the provisions of this policy applicable to a loss because of enemy action, occupation or control, the Insured's right of recovery shall not be prejudiced, provided the Insured shall comply with such provisions within a reasonable time after the Insured becomes able to do so, but in no event later than six months thereafter.

DEFENDANT'S EXHIBIT D

[Copy]

Release. RFC-1718

The Secretary of Commerce
Washington

December 30, 1942.

Jesse Jones, Secretary of Commerce, today announced that War Damage Corporation will investigate claims for loss of property in transit between any points located in the United States, and the Canal Zone, and the Territories and possessions of the United States with the exception of the Philippine Islands. All claims for loss of property in transit between such points which resulted directly from enemy attack between December 6, 1941, and July 1, 1942, should be filed with the Washington office of War Damage Corporation on or before February 1, 1943. Investigation of such claims will be conducted in accordance with the provisions of Section 5g of the Reconstruction Finance Corporation Act, as amended.

All claimants are notified that, notwithstanding the investigation, War Damage Corporation reserves the right, in accordance with the statute and the regulations issued thereunder, to determine whether or not the Corporation is liable.

[Endorsed]: Filed Nov. 12, 1946. [20]

[Title of District Court and Cause.]

STIPULATION AMENDING ANSWER

It Is Hereby Stipulated, by the parties hereto through their respective counsel, that defendant's

Answer filed in the above-entitled court, November 12, 1946, be deemed amended in the following respects:

1. In the Third Separate and Affirmative Defense appearing on pages five and six of the said Answer, the word "District" is inserted before the word "Courts" on line 1, page 6. The Third Separate and Affirmative Defense is to read as follows:

"The court is without jurisdiction in the matter because jurisdiction of the action pleaded has not been given to the District Courts."

2. The last seven words of the Fifth Separate and Affirmative Defense, to wit:

". . . War risk insurance protection offered by it" [21] which appears on page 7, line 7 of said Answer, is stricken and in lieu thereof, the words ". . . protection by War Damage Corporation" is substituted, so that the last clause of the Fifth Separate and Affirmative Defense, starting with the semicolon on page 7, line 3, reads:

". . . that under and pursuant to the provisions of its "Regulation A" and in accordance with its established administrative practice defendant did exclude and except the loss referred to in the Complaint from the protection by the War Damage Corporation."

3. The words "subsequent to" appearing on line 1, page 9, in the Eighth Separate and Affirmative Defense of said Answer, are stricken and in lieu thereof the word "between" is substituted so

that the first clause of said Eighth Separate and Affirmative Defense reads as follows:

“That pursuant to Section 5g of the Reconstruction Finance Corporation Act as added by the act of March 27, 1942, Ch. 198, Sec. 2, 56 Stat. 175, Title 15 U.S.C.A., Sec. 606b-2, and the authorized and established administrative practice of defendant, all losses sustained between December 6, 1941, and a date determined by the Secretary of Commerce, to wit, July 1, 1942, for which the defendant was and is authorized to give any protection, were and are adjusted as if defendant's policy of insurance (W.D.C. Form No. 1) were in fact in force at the time of such loss and were in fact issued for such loss; . . .”

The above-mentioned amendments to defendant's Answer shall be considered as effective with the filing of this stipulation.

Dated January 15th, 1947.

LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Plaintiff.
ALLAN E. CHARLES,
EDWARD D. RANSOM,
LILLICK, GEARY, OLSON &
CHARLES,

Attorneys for Defendant,
War Damage Corporation.

[Endorsed]: Filed Jan. 16, 1947. [22]

[Title of District Court and Cause.]

STIPULATION

It is hereby Stipulated and Agreed by and between the plaintiff and defendant, through their respective counsel, that at the time of her loss, the fair cash market value of the SS Lahaina was Six Hundred Fifteen Thousand Dollars (\$615,000). This stipulation is made subject to the objections by defendant that market value of the SS Lahaina is irrelevant, immaterial and not the measure of plaintiff's recovery, if any, herein, and said objections, and all of the defenses set forth in its answer on file herein, are hereby expressly reserved by defendant.

LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Plaintiff.

ALLAN E. CHARLES,
EDWARD D. RANSOM,
LILLICK, GEARY, OLSON, &
CHARLES,
Attorneys for Defendant.

[Endorsed]: Filed April 30, 1947. [25]

[Title of District Court and Cause.]

STIPULATION

It is hereby Stipulated and Agreed by and between the parties to the above-entitled action that plaintiff, Matson Navigation Company, had no war risk insurance of any kind covering the loss of the SS Lahaina when said vessel was sunk and became a total loss as a result of enemy attack on December 11 and 12, 1941. The term, "war risk insurance" as used herein does not refer to the claim for such loss asserted in the within action.

LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Plaintiff.
ALLAN E. CHARLES,
EDWARD D. RANSOM,
LILLICK, GEARY, OLSON,
ADAMS & CHARLES,
Attorneys for Defendant.

[Endorsed]: Filed April 30, 1947. [26]

[Title of District Court and Cause.]

STIPULATION

It is hereby Stipulated and Agreed by and between the parties to the above-entitled action that the annexed Exhibit "A" is a true copy of page 3 of that certain unofficial publication know as "The New York Journal of Commerce" in the issue of said publication for December 31, 1942, in which

appears the article under the headline "WDC to Consider Claims for Losses."

It is further Stipulated and Agreed that at the time of said issue, namely, December 31, 1942, plaintiff, Matson Navigation Company, was a subscriber to said "The New York Journal of Commerce" for delivery of the same at each of the following address: [27]

215 Market Street, San Francisco, California
30 Rockefeller Plaza, New York, New York
913-914 Southern Building, Washington, D. C.
480 Main Street, San Francisco, California

It is further Stipulated and Agreed that said plaintiff reserves all objections to the admissibility of said facts stipulated to as above in case the said defendant should offer said facts in evidence at the trial or hearing of said cause.

LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Plaintiff.

ALLAN E. CHARLES,
EDWARD D. RANSOM,
LILLYCK, GEARY, OLSON &
CHARLES,
Attorneys for Defendant.

EXHIBIT A

The Journal of Commerce and Commercial,
New York, Thursday, December 31, 1942

WDC TO CONSIDER CLAIMS FOR LOSSES

Limited to Those Caused by Enemy Action on
on Routes to Canal Zone, Territories

(Bureau of Journal of Commerce)

Washington. Dec. 30.—War Damage Corporation is prepared to look into claims for the loss of property through enemy action between any points in the United States and the Canal Zone and, with the exception of the Philippines, in any of the territories and possessions of the United States, Secretary of Commerce Jesse Jones announced today.

Secretary Jones set February 1 as the deadline for filing of all claims for loss of property in transit between those points which resulted directly from enemy attack between December 6, 1941, and July 1, 1942. Mr. Jones said that investigation of such claims would be conducted in accordance with provisions of Section 5G of the Reconstruction Finance Corporation Act, and that all claimants had been notified that, notwithstanding the investigation, WDC would reserve the right to determine whether or not it is liable in each case. Asked for a definition of a "direct enemy attack" in determining WDC liability, a spokesman for the corporation said today that a cargo of oil, lost through torpedoing, would be considered a valid case, but that a cargo lost through enemy sabotage would not.

[Endorsed]: Filed April 30, 1948. [30]

In the United States District Court for the Northern District of California, Southern Division

No. 24575-G.

MATSON NAVIGATION COMPANY,

a corporation,

Plaintiff,

vs.

WAR DAMAGE CORPORATION, a corporation,
Defendant.

Lyman Henry, Kent A. Sawyer, Hall, Henry & Oliver, 215 Market Street, San Francisco, Calif., Attorneys for Plaintiff.

Allan E. Charles, Edward D. Ransom, Lillick, Geary, Olson, Adams & Charles, 311 California Street, San Francisco, Calif., Attorneys for Defendant.

OPINION

Goodman, District Judge.

While en route from the Hawaiian Islands to Continental United States on or about December 11, 1941, plaintiff Matson Navigation Company's steamship Lahaina was attacked and sunk by a Japanese submarine. By this suit, filed March [33] 22, 1945, plaintiff seeks to recover from the defendant War Damage Corporation, the value of the steamship, which, the parties agree, is the sum of \$615,000. Right of recovery is claimed under an amendment to the Reconstruction Finance Corporation Act which on March 27, 1942, somewhat over three months after commencement of hostilities be-

tween the United States and Japan, became law. (15 USC 606b-2; 56 Stat. 175, Sec. 5 g.) By the terms of this amendatory statute, defendant was authorized to provide, not later than July 1, 1942 insurance protection against loss or damage to property as a result of enemy attack, subject to such general exceptions as defendant, with the approval of the Secretary of Commerce might deem advisable, upon the payment of premiums or charges which defendant, also with the approval of the Secretary of Commerce, might fix. So far as here pertinent, the statute also provided that such insurance protection should apply only to property situated in the United States, the Philippine Islands, the Canal Zone, territories and possessions of the United States and such other places as the President might determine to be under the dominion or control of the United States and also to such "property in transit" between any of the localities designated.

Recognizing that protection should be afforded to those whose property might be lost or damaged in the interval between the declaration of war against Japan and the date when the defendant would become an operating and functioning entity, Congress further provided in this statute that losses occurring during such interim should be compensated by the defendant without any contract of insurance, payment of premium or other charge, in the same manner as if there were insurance contract coverage. The full text of § 606 b2 is set out in an appendix hereto. [34]

Three years later, to wit, on December 29, 1944, the plaintiff presented its claim to the defendant for the value of the Lahaina. On January 19, 1945 the claim was denied upon the ground that the statutory provisions regarding property in transit were not interpreted by defendant as intended to have application to vessels in transit.

The primary question squarely posed in this litigation therefore is: whether the act of the defendant corporation in excepting vessels in transit from insurance coverage was a proper interpretation of the statute; or put in another way, was the vessel Lahaina the kind or type of "property in transit" entitled to protection under the terms of the statute during the interval between the declaration of hostilities between the United States and Japan and the effective date of the commencement of functioning by the defendant corporation.¹

No such question has been heretofore decided by the courts of the United States.

The testimony of so-called experts in the insurance field was produced at the trial concerning the meaning of the words "property in transit." The Court is of the opinion that this testimony is of little, if any, value in determining the extent and meaning of the coverage which Congress provided for in this statute. The meaning of the statutory

¹If defendant's interpretation of the statute was correct it obviously acted properly in denying plaintiff's claim and the issue as to the scope of its statutory power to make general exceptions from coverage of certain property becomes irrelevant.

language must be resolved against the background of the history of and the circumstances impelling the legislation as well as from what may be gleaned from the [35] Congressional proceedings.² These accepted guides to statutory interpretation reveal the following:

After Pearl Harbor, fear of enemy bombing along the Coasts of Continental United States was widespread. Owners of property there situated found themselves uninsured against loss due to enemy attack and unable to provide themselves with insurance of that type through private insurance companies. This tended to undermine morale and affect the maximum production essential to successful warfare.³ To allay the fears of such persons, and believing it in the public interest to act quickly as well as within his power so to do, Federal Loan Administrator Jesse H. Jones publicly announced by press release dated December 13, 1941, future governmental extension, (through a corporate instrumentality of the Reconstruction Finance Corporation, finally denominated "War Damage Corporation") of reasonable financial protection to owners of property in the Continental United States against enemy attack, without charge but

²Several special defenses have been urged by defendant, but it is clear to the court that the issue presented can and therefore should be squarely determined from the meaning of the legislative language itself.

³Senate Report No. 1012 accompanying S.2198, p. 2.

with certain exceptions and reservations. By a later press release on December 22, 1941, Mr. Jones publicly announced the extension of similar protection to owners of property in Alaska, Hawaii, Philippine Islands, Puerto Rico and the Virgin Islands.

Soon thereafter Senate Bill 2198, sponsored by Mr. Jones, was introduced in Congress. This bill aimed to put the Legislative stamp of approval upon and to provide the means for a government program of reasonable war risk protection [36] to those owners of property in the United States and its territories and possessions, who were unable to find that protection through private sources.

Hearings on the proposed legislation were first held in January 1942 before the Senate Committee on Banking and Currency. The foregoing reasons for and general objectives of the legislation were there explained by Mr. Jones.⁴ The proposed legislation, as so stated by him, did not contemplate provision for maritime insurance, and was prospective in operation. At these hearings also appeared the Honorables Samuel W. King and Anthony H. Diamond, Delegates respectively from Hawaii and Alaska. Each urged amendment of the bill to extend war risk protection to goods in transit between the United States and the Territory each represented. Their proposal was motivated by the almost complete dependency of these territories on water-borne commerce with the United States. The Delegates explained that following Pearl Harbor, commercial rates on cargo war risk insurance had

⁴Senate Committee Hearings, p. 6, 7, 9, 10, 11.

increased prohibitively and to the extent of seriously threatening the economy of the Territories unless relief were afforded and that since such insurance could not be obtained from the Maritime Commission, such property should receive the benefits of the legislation under consideration.⁵ [37]

The Hawaiian Delegate further proposed to make the bill retroactive to December 7, 1941, to cover the Pearl Harbor losses,—these losses having occurred before protection was for the first time promised by the press release of December 13, 1941.

After the Territorial Delegates had presented their case, Senator Clark of Idaho proposed an amendment to extend protection to property situated in “or in transit between” the United States and the described Territories and possessions.⁶ The

⁵Senate Committee Hearings, p. 25, 27, 28, 29, 31, 32, 33.

As to the availability of marine war risk insurance under the then provisions of the Merchant Marine Act, 1936, as amended 1940 (54 Stat. 689), the situation, as represented, was this: The Maritime Commission by such Act was empowered to issue such insurance only on American vessels and their cargoes. Since shippers of cargo could not determine in advance the type of vessel in which the same would be transported, the practical result was that while insurance on American hulls could be and was made available by the Maritime Commission under the Act, cargoes, except in a very limited way, were unprotected. Senate Committee Hearings p. 97, 99; See also House Committee Hearings on S.2198, p. 41, 42.

⁶Senate Committee Hearings, p. 73, 74.

discussion which followed is persuasive that all participants in the same were agreed that while such in-transit cargo needed and should have the protection sought by the Hawaiian and Alaskan Delegates, nevertheless the proposed bill should not extend its coverage to any maritime war risks if insurance therefor was obtainable through the Maritime Commission or otherwise.⁷

Following assurance by Mr. Jones that in the administration of the proposed law, marine protection thereunder would be limited to cases where the Maritime Commission was powerless to act, the substance of the Clark "property in transit" amendment was adopted.⁸ The bill, however, as reported by the Senate Committee, (S. Report 1012) was not retroactively effective. It contemplated a plan of insurance covering only future risks compensable through the War Damage Corporation, and based on contract and premium charges as to coverages exceeding a specified minimum amount.

On February 3, 1942, after discussion and debate, the bill with Senate Committee amendments was passed in the [38] Senate. (88 Cong.Rec. 986-999). During the discussion preceding its passage, Senator Maloney, speaking on behalf of Mr. Wagner, Senate sponsor of the bill, pointed out that the coverage originally contemplated thereby had been extended by the "property in transit" clause, not only to "the cargo of the vessel itself" but also to

⁷Senate Committee Hearings, p. 97, 98, 99.

⁸Senate Committee Hearings, p. 99, 100.

“the personal effects of people traveling on such vessels.”⁹ Coverage of vessels themselves however, was nowhere indicated in these discussions.

On February 2, 1942, Senate Bill 2198 as reported out of the Senate Committee came before the House Committee on Banking and Currency. Mr. Jones again stated the general reasons for and objectives of the bill, explaining that under Senate Committee Amendments, goods in transit would be covered only when insurance could not be obtained from the Maritime Commission, but that in his opinion the vessels themselves would not be covered.¹⁰

There was general accord with the view as expressed in the Senate Committee that Marine War Risk insurance should not be an objective of this bill, and, further that it should more specifically so state.¹¹ The following House Committee Amendment was therefore agreed to: “That such protection shall not be extended to property in transit upon which the United States Maritime Commission is authorized to provide marine war risk insurance.”¹² [39]

⁹88 Cong. Rec. p. 989-990.

¹⁰House Committee Hearings, p. 18, 21, 22.

¹¹House Committee Hearings, p. 44-47.

¹²House Committee Hearings, p. 88, 93.

It is apparent from the Committee discussions that what prompted this specificity of language was a lack of certainty on the members' part with respect to the exact scope of the Merchant Marine Act, and a desire not to duplicate any of the functions there delegated to the United States Maritime Commission.

The House Committee was, however, also of the opinion that since neither the Pearl Harbor losses of December 7, 1941, nor the in-transit cargo losses suffered before the public announcement of coverage, of December 13, 1941, were within the purview of that announced coverage, such losses, if not otherwise compensable, should as well receive the benefits of the proposed bill.¹³ It was therefore agreed that coverage should be extended not only to the defined losses which may result from enemy attack, but also to those which "may have heretofore resulted,"¹⁴ so that all persons without opportunity of having obtained war risk insurance on such past losses would be protected until a government created insurance plan was worked out.¹⁵ To fully accomplish this purpose, a further committee amendment was adopted to thus extend coverage of the bill without premium charge for the period from December 7, 1941 to a date fixed by the Federal Loan Administrator not later, however, than July 1, 1942¹⁶ (the bill having already been amended to provide for future coverage on a contract and premium paying basis). Chairman Steagall explained during Committee discussion that the bill with these amendments would cover goods in transit lost by enemy action from and after December 7, 1941 subject, however, to the proviso limiting

¹³House Committee Hearings, p. 80-81.

¹⁴House Committee Hearings, p. 82.

¹⁵House Committee Hearings, p. 84.

¹⁶House Committee Hearings, p. 94.

such coverage to property in transit upon which the United States Maritime Commission was not authorized to provide similar coverage.¹⁷ As so amended, Senate Bill 2198 was reported to the House on [40] February 6, 1942,¹⁸ (88 Cong. Rec. 1154) and was passed on March 2, 1942. (88 Cong. Rec. 1921).

During the discussion preceding the bill's passage in the House¹⁹ inquiry was made whether the government was "taking a direct loss in all of the torpedoings of cargoes and oil tankers and things like that . ." Mr. Bland, referring to H.R. 6554 to amend the Merchant Marine Act of 1940, replied that "things like that are being taken care of under the war-insurance bill, which was extended today. I have just put into the basket a report on the amendment to that bill, which covered every phase of the marine liability and risk." (88 Cong. Rec. 1903.)

After Senate disagreement with the House Amendments, the bill went to a Committee of Conference. The Conference Report (House Report No. 1907) retained the House Amendments. The

¹⁷House Committee Hearings, p. 93.

¹⁸House Report No. 1752.

On the same day, H.R. 6554 sponsored by Mr. Bland was introduced. This bill was designed to enlarge the scope of the Merchant Marine Act of 1940, and would permit of the issuance of insurance by the Maritime Commission on substantially every type of Marine war risk.

¹⁹88 Cong. Rec. 1901-1921.

only conference change here significant was the House Amendment, revised in Conference to read as follows: "Provided, That such protection shall not be applicable after the date determined by the Secretary of Commerce under this subsection to property in transit upon which the United States Maritime Commission is authorized to provide marine war risk insurance."²⁰

The conference Report did not explain the reason for this change nor was the same later discussed in either [41] Senate or House.²¹ In the House discussion of the Report just prior to the bill's passage, Mr. Steagall did answer affirmatively the question whether the "sinkings" taking place would be covered during the free protection period. (88 Cong. Rec. 2699) Coverage of "sinkings" during that period was again later mentioned with reference to the advisability, in view of their increased number, of covering losses arising from such sinkings without premium requirements. (88 Cong. Rec. 2701) Certain statements on the floor of Congress might be pointed out as indicative of a difference in understanding on the part of individual Congressional members as to the true meaning ascribable

²⁰The bill as reported by the Conference Committee, became law on March 17, 1942. (56 Stat. 174.)

²¹The most reasonable explanation for this change would seem to be that the legislators felt that by July 1, 1942, if not earlier, the Merchant Marine Act would have been so effectively amended to cover all maritime risks as to permit of the desired withdrawal of the War Damage Corporation from any field of maritime activity.

to the phrase "property in transit" or the purpose of its insertion in the bill by Senate Committee Amendment.²²

But nowhere throughout the proceedings in Congress or in Committee is there any statement or discussion indicating a conscious Congressional intent to extend the scope of the phrase beyond that originally contemplated.

The entire history of the legislation, viewed in the background of its origin and objectives, convincingly exhibits a general Congressional intent to extend reasonable free government protection against loss from enemy attack, to property in the United States, its territories and possessions, and to goods undergoing transportation between these points,—until a system of paid insurance contemplated thereby had been put in operation; and to thereafter extend similar protection under contract of insurance with premium [42] payment, except as to goods in transit insurable by the United States Maritime Commission. Coverage at any time by the War Damage Corporation, of the vehicle of maritime transportation,—the vessel itself,—was never within the contemplation of Congress.

The gist of all discussions, whether in Committee or on the floor of Congress, from the time of Mr. Jones' first public announcement to the date of passage of the Act, concerned the intent to protect cargoes in transit which were not insurable by the

²²See statements on p. 28 of plaintiff's Opening Brief.

Maritime Commission and insurable otherwise only through private sources at prohibitive costs.

It is true, as pointed out by plaintiff, that there was reference to "ships" and to "sinkings" on the floor of Congress during discussions preceding passage of the Act. But such method of ascertaining intent is specious. An isolated question and answer become misleading if not fairly set into the whole picture. Thus in the House discussions, asked whether cargoes and ships on the high seas were to be covered, the response made consecutively by each of the two different House sponsors of both the Act here involved and the amendments to enlarge the scope of the Merchant Marine Act was in the affirmative. (88 Cong. Rec. 1903.)

Congress was engaged between January and April 1942 with a comprehensive and overall plan of insurance protecting property on land and sea. This Act and Amendments to the Merchant Marine Act were the instrumentalities discussed to accomplish this objective. Each was intended to take care of different risks. Hence it is that discussions in Congress must be related severally to the proposed statutes.

Plaintiff entirely misconceives the function of the defendant as intended by Congress. Defendant's function as originally conceived was to insure residents of the Continental [43] United States against damage to their property from bombing. Hundreds of thousands of policies were thereafter issued to residents of Continental United States. The corporation still has in its treasury over \$200,000,000 col-

lected in premiums in performing this service. The defendant corporation was never proposed to have anything to do with the sea. This was in the field of the Maritime Commission. The defendant only "put to sea" because of the needs of Hawaii and Alaska—to enable these territories to receive the goods needed to carry on during the stress of the great emergency and only to the extent of protecting cargoes en route either way not insurable by the Maritime Commission. Ships were otherwise covered.

Judgment for defendant.

Dated: November 17, 1947. [44]

Appendix

Title 15 USCA Sec. 606 b-2

(2) The Reconstruction Finance Corporation is hereby directed to continue to supply funds to the War Damage Corporation, a corporation created pursuant to sections 606 b and 606 j of this title; and the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this subsection. Such funds shall be supplied only upon the request of the Secretary of Commerce, with the approval of the President, and the aggregate amount of the funds so supplied shall not exceed \$1,000,000,000. The Reconstruction Finance Corporation is authorized

to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable. Such protection shall be made available through the War Damage Corporation on and after a date to be determined and published by the Secretary of Commerce which shall not be later than July 1, 1942, upon the payment of such premium or other charge, and subject to such terms and conditions, as the War Damage Corporation, with the approval of the Secretary of Commerce, may establish, but, in view of the national interest involved, the War Damage Corporation shall from time to time establish uniform rates for each type of property with respect to which such protection is made available, and, in order to establish a basis for such rates, such Corporation shall estimate the average risk of loss on all property of such type in the United States. Such protection shall be applicable only (1) to such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States, (2)

to such property in transit between any points located in any of the foregoing, and (3) to all bridges between the United States and Canada and between the United States and Mexico; Provided, That such protection shall not be applicable after the date determined by the Secretary of Commerce under this subsection to property in transit upon which the United States Maritime Commission is authorized to provide marine war-risk insurance. The War Damage Corporation, with the approval of the Secretary of Commerce, may suspend, restrict, or otherwise limit such protection in any area to the extent that it may determine to be necessary or advisable in consideration of the loss of control over such area by the United States making it impossible or impracticable to provide such protection in such area.

(b) Subject to the authorizations and limitations prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, [45] And prior to the date determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such loss or damage. Jan. 22, 1932, c.8, § 5g, as added Mar. 27, 1942, c. 198 § 2, 56 Stat. 175. [46]

[Endorsed]: Filed Nov. 17, 1947.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 17th day of November, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman.

[Title of Cause.]

ORDER FOR JUDGMENT

Ordered that judgment go for the defendant, as will more fully appear in the written opinion this day filed. [47]

[Title of District Court and Cause.]

NOTICE

To: Messrs. Hall, Henry & Oliver, 215 Market St.,
San Francisco, Calif.; Messrs. Lillick, Olson,
Geary, Adams & Charles, 311 California St.,
San Francisco, Calif.

You Are Hereby Notified that on Nov. 17, 1947,
an Opinion was entered of record in this office in
the above-entitled case.

C. W. CALBREATH,

Clerk, U. S. District Court.

San Francisco, California, Nov. 18, 1947. [48]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 12th day of December, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

**ORDER THAT FINDINGS OF FACT AND
CONCLUSIONS OF LAW BE FILED**

Ordered that findings of fact and conclusions of law as drafted by the Court be filed in the form signed. [62]

[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

The above-entitled action came on for trial on the 30th day of April, 1947, before the Honorable Louis E. Goodman, United States District Judge. Messrs. Hall, Henry & Oliver, by Lyman Henry, Esq., and Kent Sawyer, Esq., appeared for plaintiff, Matson Navigation Company, a corporation, and Messrs. Lillick, Geary, Olson & Charles, by Allan E. Charles, Esq., and Edward D. Ransom, Esq., ap-

peared for the respondent, War Damage Corporation. Evidence, both oral and documentary, was received by the Court and briefs were thereafter filed by the attorneys representing the respective parties. The Court having considered the evidence and the law and the briefs of such parties, having been fully advised [63] in the premises, and having filed its written opinion ordering the entry of a judgment for the defendant, now adopts and makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court finds as its Findings of Fact that:

I.

Matson Navigation Company, at all times mentioned in the complaint and herein, was and is a corporation organized under the laws of the State of California, with its principal office and place of business at 215 Market Street in the City and County of San Francisco, State of California.

II.

On and prior to December 12, 1941, plaintiff was the owner of the American steamship Lahaina, which said vessel was at said time at sea, proceeding from a port in the Hawaiian Islands towards San Francisco. On December 11, 1941, the said steamship was shelled and seriously damaged by the attack of a submarine belonging to the Empire of Japan, a public enemy of the United States. As the result of said shelling, the Lahaina sank in the waters of the Pacific Ocean, a long distance

from shore, on December 12, 1941, and was a total loss.

III.

Defendant War Damage Corporation is a corporation organized and existing pursuant to the provisions of sections 5-d and 5-g of the Reconstruction Finance Corporation Act of January 22, 1932, 47 Stat. 5, as amended, supplemented and revised.

IV.

On or about December 29, 1944, plaintiff made a claim upon defendant in the amount of \$820,000 for the loss of the steamship Lahaina. [64]

On January 19, 1945, defendant denied said claim. On March 22, 1945, plaintiff filed the within action. Defendant has not compensated plaintiff for said loss, or any part of it.

The reasonable value of the steamship Lahaina at the time of her loss was \$615,000, as stated by a stipulation entered into between plaintiff and defendant.

V.

The matter in controversy exceeds the sum of \$3,000.

VI.

The steamship Lahaina, at the time of her loss, was not "property situated in the United States" or in its territories or possessions.

VII.

The steamship Lahaina was not, on December 12, 1941, or at any other time, "property in transit"

between a port or ports of the Hawaiian Islands or of any of the territories and possessions of the United States and a port of the Continental United States within the meaning of Section 5-g of the Reconstruction Finance Corporation Act, as amended by the Act of March 27, 1942 (15 USC, sec. 606 b-2) and hence its loss was not compensable under the provisions of said Act.

CONCLUSIONS OF LAW

And, as Conclusions of Law from the foregoing Findings of Fact, the court finds that:

I.

The defendant is not liable to the plaintiff for the loss of the steamship Lahaina.

II.

Section 5-g of the Reconstruction Finance Corporation Act, as amended, was not intended to, and did not, afford [65] protection to seagoing ships.

III.

Defendant is entitled to recover costs from the plaintiff.

Let judgment be entered accordingly.

Dated: San Francisco, California, December 11th, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Dec. 12, 1947. [66]

In the Southern Division of the United States
District Court for the Northern District of
California

Civil Action No. 24575-G

MATSON NAVIGATION COMPANY,
a Corporation,

Plaintiff,

vs.

WAR DAMAGE CORPORATION, a Corporation,
Defendant.

JUDGMENT

The above-entitled action having come on for trial on the 30th day of April, 1947, before the Honorable Louis E. Goodman, United States District Judge, and Messrs. Hall, Henry & Oliver, by Lyman Henry, Esq., and Kent Sawyer, Esq., appearing for plaintiff, Matson Navigation Company, a corporation, and Messrs. Lillick, Geary, Olson & Charles, by Allan E. Charles, Esq., and Edward D. Ransom, Esq., appearing for the defendant, War Damage Corporation, and evidence, both oral and documentary, having been received by the Court and briefs having been thereafter filed by the attorneys representing the respective parties, the Court having considered the evidence and the law and the briefs of such parties, and having been fully advised in the premises, and having filed its written opinion ordering an entry of the judgment for the defendant, and having [67] adopted and filed its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed

that plaintiff take nothing by said action, that the action be and it is hereby dismissed on the merits, that defendant have and recover from plaintiff its costs in the action and that defendant have execution therefore. (Costs taxed at \$117.40.)

Dated: San Francisco, California, December 19th, 1947.

LOUIS E. GOODMAN,
United States District Judge.

Approved as to form as provided in Rule 5(d).

LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Plaintiff.

[Endorsed]: Filed and Entered Dec. 19, 1947.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To: Messrs. Hall, Henry & Oliver,
215 Market Street,
San Francisco, California.

You and Each of You Are Hereby Notified that on December 19, 1947, judgment for the defendant was entered in the above-entitled case.

Dated: San Francisco, December 23, 1947.

LILLICK, GEARY, OLSON &
CHARLES,

Attorneys for Defendants.

(Admission of Service.)

[Endorsed]: Filed Dec. 23, 1947. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Matson Navigation Company, a corporation, the plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from: the judgment for defendant entered herein on December 19, 1947; the judgment for defendant embodied in the Findings of Fact and Conclusions of Law and order for filing the same filed and entered herein on December 12, 1947; the judgment for [74] defendant embodied in the opinion of the Court filed and entered herein on November 17, 1947; and the judgment for defendant, under minute order, entered herein on November 17, 1947.

Dated: February 10th, 1948.

HERMAN PHLEGER,
MAURICE E. HARRISON,
GREGORY A. HARRISON,
BROBECK, PHLEGER &
HARRISON,
LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Plaintiff,
Matson Navigation Co.

[Endorsed]: Filed Feb. 10, 1948. [75]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Matson Navigation Company, a corporation, plaintiff and appellant in the above-entitled action, hereby designates for inclusion in the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause the complete record and all the proceedings and [80] evidence in the said action.

Dated: February 16, 1948.

HERMAN PHLEGER,
MAURICE E. HARRISON,
GREGORY A. HARRISON,
BROBECK, PHLEGER &
HARRISON,
LYMAN HENRY,
HALL, HENRY & OLIVER,

Attorneys for Matson Navigation Company, Plaintiff and Appellant.

Service of the within designation and receipt of a copy thereof is hereby admitted this 16th day of February, 1948.

/s/ ALLAN E. CHARLES,
/s/ EDWARD D. RANSOM,
LILLICK, GEARY, OLSON,
ADAMS & CHARLES,

Attorneys for War Damage Corporation, Defendant and Appellee.

[Endorsed]: Filed Feb. 16, 1948. [81]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It Is Hereby Ordered that the time for filing the record on appeal in the above-entitled cause with the United States Circuit Court of Appeals for the Ninth Circuit, and the time for docketing the appeal therein, be, and each such time hereby is, extended to the 20th day of April, 1948.

So Ordered this 4th day of March, 1948.

LOUIS E. GOODMAN,
United States District Judge.

Approved:

/s/ ALLAN E. CHARLES,
/s/ EDWARD D. RANSOM,
LILLICK, GEARY, OLSON &
CHARLES,
Attorneys for Defendant and
Appellee.

[Endorsed]: Filed Mar. 4, 1948. [82]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It Is Hereby Ordered that the time for filing the record on appeal in the above-entitled cause with the United States Circuit Court of Appeals for the Ninth Circuit, and the time for docketing the appeal therein, be, and each such time hereby is, extended to the 20th day of May, 1948.

So Ordered this 7th day of April, 1948.

/s/ DAL M. LEMON,

United States District Judge.

Approved:

ALLAN E. CHARLES,
EDWARD D. RANSOM,
LILLICK, GEARY, OLSON,
ADAMS & CHARLES,
Attorneys for Defendant and
Appellee. [83]

[Endorsed]: Filed April 8, 1948.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBIT TO THE CIRCUIT COURT OF
APPEALS

The Court being of the opinion that the original of Plaintiff's Exhibit 1 should be sent to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of a copy thereof, it is hereby ordered that the same be transmitted by the Clerk of this Court with the record on appeal in the above-entitled cause to the Clerk of the said Circuit Court of Appeals and that the same be returned to the Clerk of the above-entitled Court upon the final disposition of said cause upon appeal.

Dated: May 4th, 1948.

LOUIS E. GOODMAN,
United States District Judge.

Approved:

ALLAN E. CHARLES,
EDWARD D. RANSOM,
LILLICK, GEARY, OLSON,
ADAMS & CHARLES,
Attorneys for Defendant and
Appellee.

[Endorsed]: Filed May 4, 1948. [84]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 84 pages, numbered from 1 to 84, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause of Matson Navigation Co. vs. War Damage Corporation No. 24575 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$8.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 7th day of May, A.D. 1948.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ E. H. NORMAN,
Deputy Clerk. [85]

In the Southern Division of the United States
District Court in and for the Northern District
of California

No. 24,575-G—Civil Action

MATSON NAVIGATION COMPANY,
a Corporation,

Plaintiff,

vs.

WAR DAMAGE CORPORATION, a Corporation,
Defendant.

REPORTER'S TRANSCRIPT

Wednesday, April 30, 1947

Before: Hon. Louis E. Goodman,
Judge.

Appearances:

For Plaintiff: Lyman Henry, Esq., Kent A. Sawyer, Esq., and Gregory Harrison, Esq.

For Defendant: Lillick, Geary, Olson and Charles, by Allan E. Charles, Esq., and Edward D. Ransom, Esq. [1*]

The Clerk: Matson Navigation Company vs. War Damage Corporation.

Mr. Henry: Ready.

Mr. Charles: Ready, your Honor.

Mr. Henry: If the Court please, this is an action by the Matson Navigation Company as former owner of the SS. Lahaina, which was sunk by enemy

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

attack, submarine shelling, on December 11 and 12, 1941; in other words, within four or five days after the attack on Pearl Harbor.

The War Damage Corporation, the defendant in this action, represented by Mr. Charles and Mr. Ransom, is a separate entity, a corporation formed by the Reconstruction Finance Corporation and expressly made subject to the power to sue and also to be sued in any court of competent jurisdiction, and the Complaint sets forth the statutory grounds for the jurisdiction of this Court in our opinion. I won't mention that now.

Many of the things that could be in detail mentioned to your Honor will, of course, be covered by briefs on this matter because it largely involves legal issues.

Just a few brief statements as to the facts of the loss. The SS. Lahaina was a vessel owned by the Matson Navigation Company and had been trading many years between the Hawaiian [2] Islands and Pacific Coast ports, particularly California. She sailed from Aukini, a port in the Hawaiian Islands, on December 4, or some three days before Pearl Harbor in the year 1941. She was enroute from Aukini to San Francisco on that particular voyage, or as we like to put it, she was "in transit" from ———— to San Francisco. The Court, of course, will recall the confusion, uncertainty and apprehension, even that existed in the minds of the general public following Pearl Harbor and the great fear of losses from enemy attack, and that there was no cer-

tainty that a person might not be subjected to a loss that he was more or less an innocent victim of. With possibly that primary thought in mind, to alleviate that very understandable apprehension, Mr. Jesse Jones, who was the Federal Loan Administrator and also Secretary of Commerce at the time, on December 13, 1941, issued a so-called public announcement that reasonable protection against loss resulting from enemy attacks sustained by property owners in the continental United States through damage to buildings and personal property would be furnished by a corporation that was organized then and there under the authority that was assumed and existed under the Reconstruction Finance Corporation Act, dating back some months prior to the war, of course, so far as that authority was concerned, and the corporation was known originally as the War Insurance Corporation. Its name was later changed to the name under [3] which the defendant appears in this action, the War Damage Corporation. A fund of One Hundred Million Dollars, the limit of the then authority under the Reconstruction Finance Corporation Act, was made available to this War Insurance, or I will refer to it for simplicity as the War Damage Corporation. It is the same entity, just a change of name. No premium for the time being was to be charged, and the formalities of declarations and that sort of thing were waived or were not required.

The matter continued on that basis, that is, the public announcement by Mr. Jesse Jones, until the

act of Congress, which finally became law on March 27, 1942, and that is the statute under which we are seeking recovery in this action, except for one minor change shortly after the first public announcement on December 13, 1941: On December 22, I believe it was, 1941, an announcement was made that this protection that was originally only for losses in the continental United States would be extended to territories and possessions of the United States.

Then in January, 1942, bills were introduced in both houses of Congress to validate or extend and make more certain the protection that had been announced under this public announcement or these public announcements of the Federal Loan Administrator, and also to increase the fund which was authorized from One Hundred Million Dollars to the sum of One Billion [4] Dollars, and after a number of changes or amendments in the course of the legislation, the plan was finally adopted as a public law on March 27, 1942, and this statute, as mentioned before, is the Act under which we are suing.

The statute is in the form of an amendment to Section, or an addition by amendment to Section 5(g) of the Reconstruction Finance Corporation Act, and is found in Section 606 (b) of Title 15 of the United States Code. For convenient reference I simply had that run off on a separate page, and I will give opposing Counsel a copy of it. It may be in the course of discussions there will be some reference to it.

The Act provided that the Reconstruction Finance Corporation was authorized to continue to supply funds to the War Damage Corporation in an aggregate amount of One Billion Dollars and that the War Damage Corporation was authorized to use such funds—and I am quoting now—“to provide through insurance, reinsurance or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack, with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable.”

And continuing with the substance of the Act, “This protection shall be made available on and after the date to be determined by the Secretary of Commerce, but not later than July 1, 1942, upon the payment of premiums. The protection [5] shall be applicable only, (1)—and I am quoting now—‘to such property situated in the United States, the Philippines, the Canal Zone, and the territories and possessions of the United States, and (2) to such property in transit between any points located in any of the foregoing’.”

For example, in our opinion “property in transit” between points or ports in the Hawaiian Islands and California, includes the “Lahaina,” there is no dispute the Lahaina was enroute here, as we submit, “in transit” between Hawaii and California at the time she was attacked and shelled by a Japanese submarine on December 11, 1942. Such protection was not to be applicable after this

above-mentioned date, that is, after July 1, 1942, to property in transit upon which the United States Maritime Commission was authorized to provide Marine War Risk Insurance. In other words, that exclusion was for the period after July 1, 1942.

Now, the above-mentioned or stated provisions looked primarily to the coverage by insurance policies or contracts that were issued on regular application and for which some premium charge or fee was made. This, of course, did not take care of the so-called "free" insurance that was originally announced within the few days after Pearl Harbor, that is, the public announcement that Mr. Jesse Jones made originally on December 13. But in the later section of the Act, which is subsection (b) of this Act, that coverage was picked up, and [6] to cover this free or non-premium insurance, Section B of this same Act was incorporated, and that Section provides briefly as follows: That any loss or damage to any—and now I am quoting—"such property," meaning real or personal property in the general definition of Section A, "sustained subsequent to December 6, 1941, and prior to the date mentioned above, to be determined by the Secretary of Commerce," which was actually July 1, 1942. In other words, for losses in that interim between Pearl Harbor and July 1, 1942, the provision was that the War Damage Corporation, or the owners of such property that has been lost, may be compensated by the War Damage Corporation without requiring—and I am quoting now—"a contract of insurance or payment of premium or other charge."

Now, it is the position of the Matson Navigation Company in this action that the statute is clear, clear on its face, and under its clear terms the Matson Navigation Company is entitled to recover. Those clear provisions, we submit, are as follows: First, the Act provides that all property in transit between American ports was afforded coverage without premium or policy for the period between December 6, 1941, and July 1, 1942.

The Court: But you said that this loss did not take place until December, 1942?

Mr. Henry: 1941, your Honor. [7]

The Court: You said a moment ago December, 1942, and that is why I was confused.

Mr. Henry: That was a slip of the tongue, and I wish to withdraw that.

The Court: This loss occurred immediately?

Mr. Henry: Four days after Pearl Harbor, that is correct. And, Second, the Lahaina was property "in transit" between Hawaii and California, and she was lost by enemy attack.

The Matson Navigation Company filed this claim with the War Damage Corporation on or about December 29, 1944, and this claim was denied by a letter from the War Damage Corporation, which reads as follows: It is attached as an exhibit to our Complaint, and there is no dispute as to the authenticity of the document. That is Exhibit A attached to our Complaint, and I will read it with your Honor's indulgence:

“War Damage Corporation
Washington 25,

January 19, 1945

“Mr. Melvin Price
Matson Navigation Company
215 Market Street
San Francisco 5, California
SS Lahaina

“Dear Mr. Price:

Acknowledgment is made of your letter of December 29, 1944.

The statutory provisions regarding property in transit [8] to which you refer are not interpreted by this Corporation as intended to have application to vessels, and, pursuant to authority contained in the Act, all vessels and water-craft other than (a) those used exclusively for storage, housing, manufacturing or generating power, (b) vessels while under construction, until delivery by the builder or sailing on delivery or trial trip, whichever shall first occur, and (c) pleasure water-craft while laid up afloat or ashore, have, with the approval of the Secretary of Commerce, been excluded from the protection authorized by the Act of March 27, 1942. It is, therefore, impossible for this Corporation to recognize the claim stated in your letter.

“Very truly yours,

M. W. KNARR,
Secretary.”

There is no dispute that he was the Secretary of the War Damage Corporation. The Court will note that that denial was made upon the basis that the Corporation had determined that vessels of the type of the Lahaina were not covered by reason of an exclusion from the protection which was stated to have been authorized by the Act of March 27, 1942.

Now, following the denial of this claim this action was brought and a number of affirmative defenses have been set up by the defendant, and in order to put before the Court in [9] rather brief fashion the issues of this case, I would like to summarize briefly those affirmative defenses:

The first affirmative defense is simply a general statement that the complaint fails to state a claim against the defendant; in effect, a general demurrer.

The second affirmative defense is that the Court is without jurisdiction because any remedy that the plaintiff has is restricted to an administrative action, if any. That is the language: "if any."

The third affirmative defense is that the Court is without jurisdiction because jurisdiction has not been granted to the District Courts.

These last two defenses that were restricted to an administrative remedy and the District Courts do not have jurisdiction is made in spite of the fact, your Honor, we submit it is quite clear, and it is admitted, that there is the statement in the statute and in the charter of the War Damage Corporation, that it has the power and is expressly given the power to sue and be sued in any Court of competent jurisdiction.

The fourth affirmative defense is somewhat inscrutable in my judgment. It simply states that the relief prayed for is improper and erroneous. Now, the relief that we pray for here, your Honor, is very simple. We are praying for a money judgment for the fair cash market value of the Lahaina, and that figure—I will submit stipulations in that regard—of the fair cash value of the Lahaina is not in dispute before your Honor. We have a stipulation as to what her fair cash market value was.

The fifth and sixth affirmative defenses may be considered together. Briefly, the defendant contends that certain regulations made applicable for the period subsequent or beginning with July 1, 1942, or more than six months after the loss of the Lahaina, and they are expressly made applicable for the period after July 1, 1942, at a time when premiums were charged and insurance policies were issued; that that set of regulations for the period after July 1, 1942, has the effect of excluding the plaintiff's claim.

The sixth affirmative defense, which is somewhat similar, is based upon a so-called order or resolution of the War Damage Corporation which was adopted, your Honor, on October 2, 1944, almost three years after the loss of the Lahaina, and under that resolution the defendants contend that the plaintiff's rights were wiped out, that there was and is no right of recovery because of a resolution adopted almost three years after the loss of the Lahaina.

The Court: Do you concede that there is under this statute authority on the part of the War Damage Corporation with the approval of the Secretary of Commerce to exclude?

Mr. Henry: Only under certain conditions, your Honor. [11] Primarily on the exclusion of territory—when we are speaking of losses within territorial limits of certain areas throughout the world, where there are losses in those territories, after control by the United States had—

The Court: I think you read to me the sentence that the War Damage Corporation may use its funds to provide protection against loss or damage to property, and so forth, which may result from enemy attack, with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable.

Mr. Henry: Yes, it is our contention that that authority does not extend to such a specific retroactive and not properly general exclusion where the conditions of the statute itself are clearly met, such as we have here.

The Court: Do you complain of the invalidity of this exclusion because of the fact that it is retroactive?

Mr. Henry: Retroactive plus the fact that it is an exclusion in violation and not within contemplation of the statute as a general exclusion, but it has a particular application to a particular type of property, and is therefore not properly within the contemplation of the Congress in providing for general exclusions.

The Court: The case really turns upon the validity of this so-called exclusion order?

Mr. Henry: We have ten affirmative defenses, your Honor. [12]

The Court: If that is a proper exclusion——

Mr. Henry: Then I think——

The Court: Provided these other grounds are not of sufficient merit to warrant consideration, that would be the determining issue, then?

Mr. Henry: That is an important issue, but in our judgment—and I think we can satisfy your Honor in the briefs on that—the exclusion that was made three years after the loss here, if permitted to be effective, would nullify the clear congressional intent, because they could pass a resolution excluding Diesel vessels, they could exclude steamships, they could exclude vessels under one thousand tons, but still include all vessels over ten thousand tons, or whatever it might be—in other words, within general statutory and administrative law there is a definite control over any such power to exclude where the intent of the Congress by the statute that has been adopted is clear. That is our position, your Honor.

The seventh affirmative defense, just briefly, asserts that since the United States Maritime Commission had some authorization to provide Marine War Risk insurance, the War Damage Corporation was prohibited from giving such coverage, and it is our position that the assertion of this defense completely ignores the provision of the statute that reads as follows in that connection: [13]

“Such protection shall not be applicable after the date determined by the Secretary of Commerce,”

which is July 1, 1942,

“to property ‘in transit’ upon which the United States Maritime Commission is authorized to provide Marine War Risk insurance.”

So that it is our position under the express terms of the statute this defense saying, that because the Maritime Commission may have had some authority to issue Marine War Risk insurance, that that condition under the statute could not be operative until July 1, 1942, and thereafter, that is, for losses and conditions arising after that. There is no dispute that that date, as I mentioned, that is referred to in the statute as determined by the Secretary of Commerce was July 1, 1942.

The eighth affirmative defense is a ground that since the statute provides that indemnity or compensation can be made during the so-called “free period,” that is, from December 6, 1941, to July 1, 1942, as though policies had been issued, and so forth, without the actual issuance of a policy, that the plaintiff in this action is barred because if a policy had been issued, then the policy would have contained a provision that suit should have been brought within twelve months after the issuance of the policy, but then we could not have gotten a policy according to the War Damage Corporation’s later determination, [14] and therefore we are to

be barred under the 12-month provision on a policy that even was not issued, but was unissuable under the subsequent resolution.

The ninth defense is similar to the one I just mentioned. The contention there is since the policies that they did issue for the premium period beginning after July 1, 1942, contain a provision for a certain type of formal claim that should be filed, and since we did not file that claim, even though we did not have a policy, we did not comply with the terms of a policy which in our opinion was certainly never issued, and in our opinion was unissuable under the then practice of the War Damage Corporation.

The tenth affirmative defense is based upon somewhat similar attempts, in our judgment, your Honor, to try retroactively or by some subsequent act of the War Damage Corporation to debar a plaintiff with a meritorious claim, which we believe ours is, but it is on such tenuous ground that I think I can describe it very briefly and point out what I mean when I say on tenuous ground. On December 30, 1942, there was a so-called press release—not a formal order, but a press release of the War Damage Corporation or Mr. Jesse Jones, which actually stated, and it is pleaded as an exhibit to the answer in this action, that losses for property “in transit,” and so forth, should be filed by February 1, 1943. In other words, this press release is dated December 30, 1942. It is [15] Exhibit D, your Honor, attached to the Answer. It is the last

exhibit. It should be filed with the Washington office of the War Damage Corporation on or before February 1, 1943. Now, that is only a press release, and while the Answer in this action pleads, with respect to that defense, that there was this resolution or public announcement, I should say, the answer states, on the last page of the answer, Page 10, that there was this public announcement stating that all claims for this free period of coverage of property "in transit" must be filed with the Washington Office of the War Damage Corporation on or before February 1, 1943, and then when we read the press release itself—it is only a press release on the thing—it states that they should be filed. Even if we should consider the press release as a binding order, I do not believe that a proper construction would be considered as a bar to an action. But there is the further point in that respect, your Honor—and that is one of the reasons why I read, so your Honor may have our views in mind at any rate, the text of the letter under which our claim was denied, the claim was not denied because we were late; it was denied because they had determined that vessels were not covered. So there is an elementary principle of insurance law and practice that where a claim is denied upon some specific ground like that, it amounts to a waiver of whatever formal technical grounds might exist on the thing. We believe the case is one to be determined [16] primarily on issues of law and what brief facts there are, from the standpoint of the presentation of the plaintiff's case,

or in support of the plaintiff's case, are covered largely by stipulation or admissions in the answer. I wish to offer at this time, if I may, a copy of the stipulations.

The Court: I take it there has been no case which has adjudicated this similar question?

Mr. Henry: No, there is not, your Honor.

The Court: Otherwise you probably would not be here.

Mr. Henry: The record will show later there have only been three claims for losses of hulls. One of those was the Union Oil Company case which was tried by a Jury before Judge Roche, but it went to the Jury on the simple factual issue of whether the tanker there was lost inside the 3-mile limit, and they did not come within this section of the statute that we are relying upon, namely, property "in transit," because that condition of the statute, or the condition of the statute there requires that the property must be "in transit" between American ports, whereas the Montebello, the Union Oil case, that went to the Jury on this factual question of whether it was lost inside the 3-mile limit or not——

The Court: Is that the case where they took the photographs under water?

Mr. Henry: That is right, but they could not come under the "in transit" provision, because the vessel was found from [17] California to British Columbia. It was not "in transit" between American ports. It did not present, as far as even determination by the Jury is concerned, the issues which

we have here, except it was allowed to go to the Jury on the assumption that there was a liability on the War Damage Corporation during this free insurance period if the factual conditions of that free insurance had been met.

The Court: Before you proceed, I wish to have a report from the Grand Jury.

The Court: You may proceed.

Mr. Henry: If the Court please, I would like to offer first the stipulation that the fair cash market value of the SS. Lahaina at the date of the loss in question was \$615,000. The stipulation contains a reservation by the defendant as to the relevancy of that item, but nevertheless there is no dispute that that was the fair market value in cash at that time.

Mr. Charles: If the Court please, the stipulation reserves our objection. I assume that the Court would not care to hear argument at the present time with respect to the nature of our objection.

The Court: I assume from what has been said that that goes to the merits of the question of the right to sustain any claim, doesn't it? Your point would be the same whether [18] this was \$615,000 or \$10?

Mr. Charles: Yes, your Honor, but in addition to going to the merits of the action itself, the objection is more precise. The statute refers to reasonable compensation, and our objection is that the market value cannot be fixed by the Court because the statute gives the authority to the administrative agency, the War Damage Corporation, to determine

what is a reasonable compensation, and that determination has been made with respect to other types of property that the corporation deems covered by the Act. The legislative history shows that the legislators considered, and the proponents of the bill considered that the reasonable compensation might be 75 per cent of the value or it might be some other standard, and in some cases, as our testimony will show, a limit has been set with respect to jewelry, for example, of \$1,000. No claims above \$1,000 have been recognized at all. That is the nature of the objection, but I think we can, if the Court wishes, argue the matter more fully later.

The Court: Suppose a claim were presented to the War Damage Corporation and it was rejected on some other ground other than the question of the amount involved, and assuming the right to proceed in court; then is the essence of your objection, under those circumstances, all the Court would be empowered to do would be to say that they have a claim but the Court would not have the power to fix the amount of claim, or [19] it would have to refer it, let us say, back to the Corporation with directions for it to fix the amount?

Mr. Charles: Yes, although our objection is more fundamental than that. We construe the statute to leave to the administrative agency alone the recognition of any rights which claimants may have. This statute does not create a right of action in claimants.

The Court: That is covered in one of the defenses that you have made, that there is no jurisdiction in the Court to hear the matter.

Mr. Charles: That is correct, your Honor.

The Court: I suppose we could save all those points and present them.

Mr. Charles: I suggest we reserve our objection.

The Court: The stipulation may then be admitted subject to the objections you have made in court.

Mr. Henry: They are stated in the stipulation, your Honor.

The Court: The Court will reserve decision on those objections until such time as the case is decided.

Mr. Charles: Thank you.

Mr. Henry: The second stipulation, if I may, your Honor, is the stipulation that at the time of the loss of the Lahaina the plaintiff had no war risk insurance of any kind on the vessel—no war risk insurance, except the term “War Risk [20] Insurance” is not to be considered as stating that the plaintiff under this stipulation had no war risk insurance from the defendant in this action.

Mr. Charles: If the Court please, we make the objection to that, not to the stipulation, but we make the objection as to the evidence offered by the stipulation that it is irrelevant and immaterial and does not bear on any of the issues of the case.

The Court: Do you wish those objections reserved under the same conditions as in the case of the former stipulation?

Mr. Charles: Yes, if the Court please.

Mr. Henry: Then I would like to offer the deposition of Captain Hans Matthiesen, who was

the master of the Lahaina at the time. The fundamental issue is not in dispute at all. It will be stipulated the Lahaina was lost by enemy attack, but the detail is in there if it should be interesting to the Court, at any rate, of the circumstances of the loss; so we do offer that deposition.

The Court: Is the reading of that waived?

Mr. Henry: The reading of that, as I understand, can be waived, is that correct, Mr. Charles?

Mr. Charles: Yes.

Mr. Henry: Then I would ask Counsel on a matter that I discussed previously if Counsel will stipulate with me that we refer in briefs and the Court may consider it being in [21] evidence the Panama Canal Rules of the Road, as appearing in Farwell, a private publication, "Farwell's Rules of the Road," published originally in 1939 and again in 1944, or whatever the date was, and that is agreeable.

Mr. Charles: Yes, that is agreeable, your Honor. Counsel may refer to Farwell. We, of course, reserve our objection of immateriality.

Mr. Henry: Yes, but there won't be any objection to the authenticity of the reference.

Mr. Charles: Not at all.

The Court: Counsel, is this proceeding today going to be transcribed?

Mr. Henry: I think we will arrange for that, yes, your Honor.

The Court: I am not making any point that you should do it, but if you are going to have it

transcribed I would not need to make as much a record as I intended to take of it.

Mr. Henry: Yes.

Mr. Charles: We have asked Mr. Sweeney for copies.

The Court: What was the Captain's name?

Mr. Henry: Matthiesen. And then one further stipulation that I have also discussed with Mr. Charles, that they will make no objection to the authenticity of the so-called Union Contract that I am about to present as merely an example, according to our position, of the common usage of the term "transit" or "Transiting," and particularly, and so that there may be convenient reference to it in the record, I would like to read Section 29 of this printed contract, which is dated to expire on September 30, 1941, between various steamship companies and the National Maritime Union of America. Section 29 I am quoting now:

"Transiting canals: When transiting canals such as the Panama, Manchester, and so forth, men on their watch below who are required on deck for the purpose of handling lines, or standing by winches, etc., shall be paid the regular rate of overtime. On Saturday afternoons, Sundays and holidays, overtime shall be paid all men required on deck standing by winches or handling lines."

There will be argument before your Honor, I am certain, from the opposing counsel that the words or phrase "in transit" is not clear and that therefore

they are entitled to resort to extraneous sources and attempt to give a different meaning from that which we consider to be the clear, common and popular meaning of that phrase, and this is offered at this time somewhat in anticipation, simply as an example of a general and popular usage of the phrase.

Mr. Charles: If the Court please, may we have the same objection?

The Court: Very well.

The Clerk: Are you offering this? [23]

Mr. Henry: Yes, I would like to offer that. I have a number of other union contracts here where a similar phrase appears. I wonder, to save cluttering the record, whether you would be willing to stipulate that there are a number of union contracts where the same or substantially the same phrases appear?

Mr. Charles: We would have no objection to reference being made in Counsel's brief. I assume those references go to transiting the Canal.

Mr. Henry: Yes, the use of the word "transit."

Mr. Charles: It is not used excepting in those union contracts in connection with transiting the Canal.

Mr. Henry: Yes. I think possibly, unless your Honor has some questions at this time, that that will be sufficient to present the basic issues as we see them and to cover the factual issues so far as there may be any factual issues in this case from the plaintiff's standpoint.

(The union contracts in question were thereupon received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Charles: If the Court please, the War Damage Corporation is owned by the Reconstruction Finance Corporation and is a Government agency. However, the RFC has used private counsel, which is the occasion of our appearing here and not the United States Attorney. Mr. Henry has made a very fair and able statement of the background of this suit, and while [24] we do not agree with the conclusions, I would like to state briefly what our defenses are as we see them. I would like also to refer, in order that the Court may have a clear picture of the problem, somewhat further to the background of this statute under which the suit has been brought, and the references which I make, which might appear to the Court to be outside the record, are embraced within the legislative history, and if I go beyond that Counsel will correct me.

The legislative history shows, and your Honor will remember, that shortly after Pearl Harbor people, particularly in San Francisco and on the West Coast and on the East Coast, looked at their fire insurance policies, thinking of the possibility of air raids and were alarmed to find that there was an exclusion with respect to war risk, and when they went to their brokers they found out that war risk insurance on their homes and farms, crops, was not available, that it was a form of insurance that was not written. The resulting agitation was such that, as Mr. Henry stated, Mr. Jones went to the President and they arranged for the creation of the War Insurance Corporation, the name being

changed later to War Damage Corporation, and that corporation was created to provide war risk insurance. Immediately after the creation of the Corporation a press release was issued by Mr. Jones which stated that for the time being everybody in the continental United States would be covered for war damage. And [25] they excluded certain types of property, such as curios, antiques, jewelry—my enumeration may be inaccurate—and then that press release was further amplified and coverage given by the press release was amplified by another press announcement which stated that in addition to the coverage provided for by the original press release, the coverage would be extended to property destroyed or lost by enemy attack in possessions of the United States, and both releases stated that additional terms and conditions would be announced, and that for the time being no premiums would be required.

The War Insurance Corporation was formed under Section 5(d) of the RFC Act, and that is the section under which the Defense Supplies Corporation, the Metal Reserves Corporation, and many of these other war agencies were created. There was a provision and there is a provision in Section (d) which provides that the RFC may create these corporations for the purpose of aiding the war effort, and it was thought by the RFC officials that they had the authority under that section to embark on this new scheme of war risk protection. It was not feasible at first to charge any premium.

Then in January, 1942, they went to Congress with a bill which provided that the RFC was directed to supply additional funds to War Damage Corporation. The bill did not include any reference to any marine coverage whatsoever. The bill was amended in the Senate during the hearings to include the [26] language, "property in transit." The background of it was this: If course, in our prior wars we had not had the same problem. The bombing damage was something new in World War II. Marine war risk insurance had been available for years and years; in between wars the insurance was available. It is available and is a common matter now, and because of the possibility of marine war risk insurance rates being too high or the commercial market being insufficient, we had a statutory program in which the Maritime Commission was given the authority to write war risk insurance upon hulls of ships and upon cargo.

There were certain limitations in that statute. One of the limitations was that the Maritime Commission could not insure cargo carried on foreign hulls, and when the War Damage Corporation statute was presented to the Houses and the hearings, which were quite extensive, commenced on that bill, the only persons who appeared, almost the only persons who appeared, other than the RFC officials, were the delegate from Hawaii and the delegate from Alaska, and they induced Congress to introduce in the bill an amendment covering "property in transit." They said that while the Maritime Commission had authority to issue war risk insur-

ance, and while they conceded the undersirability of having two agencies of Congress, two agencies of the Government doing the same thing, yet people in Hawaii were having a hard time getting [27] and paying for war risk insurance, which was then issued only in the commercial market. The Maritime Commission could not supply that, not insofar as cargo on foreign hulls was concerned, and there were foreign ships, such as the Norwegian ships and those of other allies, carrying cargo between the United States and Honolulu. They said that the Islands and Alaska were in a rather unique position because they depended upon shipments from the mainland for almost everything they had—food, clothing, and many other goods—and they were having to pay, they said, very high marine insurance, war risk rates.

So this amendment was introduced into the statute, and as we will show in our briefing, it is quite apparent from the hearings at the time this amendment was adopted that they were talking not about ships, but they were talking about cargo, personal effects, and other types of personal property that would be carried in ships and carried in planes, that they were not thinking of the hulls of ships.

The Maritime Commission at the time, we will show, had full authority to insure all American ships with war risk insurance. The commercial market was operating. A great many owners had their war risk insurance before Pearl Harbor, and a great many of them had it after Pearl Harbor. It is our position that ships were not within the scope and purview of this statute. [28]

The whole pattern of war risk insurance was this: there was the marine insurance provided by the Maritime Commission. There was the insurance for service men, war risk insurance provided by a certain act. And then when Pearl Harbor came along there was this new need, which was provided for by this War Damage Corporation statute, the first part of which, and the principal part of which set up an insurance scheme for the issuance of policies, the payment of premiums and particularly provided that the Corporation should cover only certain types of risks. The statutory provisions upon which the plaintiffs are relying is the second part of that statute, the section of the statute, which was an approval of the War Damage Corporation compensating certain types of property which they had not excluded from the protection of the Act until July 1, 1942, on a free or gratuitous basis, and that was in effect a backing up of what had already been done by War Damage Corporation and by this press announcement, a rather unique governmental order, to be sure, but with some authority in Section 5(d) of the RFC Act to justify it.

We take the position that there is no right of action created for the benefit of claimants by this Section 5(d) of the RFC Act, the War Damage Corporation statute. It is true that the sovereign immunity defense which would otherwise lie has been waived by the charter of the Corporation itself, which states that the Corporation may sue and be sued, a very [29] reasonable provision in view of the fact that the Corporation was going to be

issuing policies, and persons who had policies and had paid for those policies should certainly have a right to sue the Government. But the statute itself, as we see it, is an appropriation statute for the purpose of addition additional funds and setting the limitation upon which this additional billion dollars would be authorized by the United States. It states in its title that it is a financing statute. It is a statute, as was noted in the legislative history, which places limitations upon the use of the funds, but it was not an authorization measure. That is particularly clear from the language which the plaintiff must rely upon to find any right of recovery, and that is the fact that under Subdivision (b), which covers the free protection provision of the Act, the language is permissive and not mandatory. The Court will note a very careful selection of the words "shall" and "may" in Subdivision (a) of the Act.

The Court: Would that argument apply in the case of where the War Damage Corporation had actually issued a policy of insurance?

Mr. Charles: No, it would not, if the Court please, because Subdivision (a) applies to the insurance policy program, and there is not that same choice of words as appears in Subdivision (b).

The Court: In other words, when the War Damage Corporation [30] got paid for issuing the policy it could be sued, but where it gave the policy for nothing, it could not be sued.

Mr. Charles: That is right, with this limitation that, of course, if the War Damage Corporation should arbitrarily and capriciously refuse the payment of a claim that was clearly due to the plaintiff—for example, if you and I own buildings across the street and they were damaged in enemy attack and you were paid and I was not paid, the authorities, of course, hold that the action of the agency of the Government could be corrected by a proceeding in the nature of mandamus, where the action of the Corporation was capricious.

The Court: Then there would be jurisdiction in the Court, wouldn't there?

Mr. Charles: There is always jurisdiction in the Court independently of this statute.

The Court: You are thinking now in terms of the general power of the Court to restrain or to correct abuses of administrative or executive authority?

Mr. Charles: That is correct.

The Court: And you say that would be the only basis for jurisdiction in a case where there was a refusal of the War Damage Corporation to compensate under that provision (b) of the statute?

Mr. Charles: Yes, your Honor, that is correct. Subdivision (b) employs language which is clearly permissive, when [31] it says, "Subject to the authorizations and limitations prescribed in Subdivision (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined by the Secretary of

Commerce under Subdivision (a) may be compensated;" and the legislative history likewise bears that out.

The reason for it, I think, is this: Congress was presented with the fact that the War Damage Corporation was already a going concern; that, as Mr. Jones stated to both Houses, "We have already a hundred million dollar policy outstanding for people in this country for loss and damage by enemy attack," and they were in effect in this statute, not creating rights in claimants, but authorizing the agency to disburse additional sums of money on the basis of a plan set out in the statute. No express right to a court appears in the Act itself.

As your Honor noted, it is quite clear that the War Damage Corporation was given the powers to exclude types of property from the coverage of the statute.

The Court: Before you leave that now—I do not want to detract you from your argument, but in case it is necessary for me to follow any evidence in the matter, I would like to get that point clear in my mind. Under that clause (b) it is your contention that there being no absolute obligation under the statute on the part of the Corporation to compensate [32] for a loss during this six months period as if there were a policy issued, and therefore the only way any complaint of anyone who claimed the benefit of that section against the War Damage Corporation could be heard in court would be if there were the type of action on the part of

the War Damage Corporation that would amount to an arbitrary excess of power. I am not trying to put the words in your mouth, but I am trying to find out——

Mr. Charles: You are expressing it better than I was able to and, of course; there is nothing unusual in that. Congress, if it chooses, may grant a right and make an administrative remedy a sole remedy. Congress may grant a right and give a legal right of enforcement. Congress may give a right and provide that the legal right is exclusive or the administrative remedy is exclusive. And there are many instances in which no remedy is given whatsoever, except the administrative remedy which lies in the discretion of the Agency, and can only be corrected for abuse of discretion. This was dealing with a gratuity which the War Damage Corporation had purported to hold open to everyone in the country, and it is understandable that Congress might say, as they did here, "You are undertaking this. All right. You may compensate for the types of property that you cover. You may make this compensation and we will give you the additional funds to do it, without affording a right of action to sue [33] on claims under that Subdivision (b)."

The statute expressly provided that the Corporation should have the power to except from the coverage of the Act. I am now referring to Subdivision (a) specifically—exclude from coverage of the Act different types of property. The press release, when it had been initially announced, included the

exception of certain types of property and stated that other terms and conditions might be announced. The bill as it was originally presented did not have any provision for general exceptions, but the proponents of the bill pointed out that they expected all the details of the coverage to be left to the War Damage Corporation, and this general exception provision was included in Subdivision (a) and is provided likewise for in Subdivision (b) in the over all program by the words "subject to the authorization and limitations prescribed in Subdivision (a)."

Now, the Corporation, notwithstanding the fact that it believed that ships were not embraced within the purview of the statute, and notwithstanding the fact that it believed that the term "property in transit" did not include ships, in order to clarify the question, provided specifically that ships and a great many other types of property should be excluded, and a resolution was passed on October 2, 1944, for the purpose, as the minutes which we will introduce in evidence will show, of clarifying the prior position of the Corporation, the consistent position of the Corporation, that ships were [34] excluded from the coverage of the Act.

Now, the point was made by opposing counsel that there might be a question as to the validity of the exclusion due to the fact that it was retroactive, but the answer, your Honor, to that is that the statute itself is retroactive insofar as any claim here would be covered. The statute was not passed until April, 1942. Plaintiff's loss occurred on December

12, 1941, and the Act necessarily contemplated, insofar as the free protection, insofar as the claims which had already accrued are concerned, that the exceptions would be retroactive. The power of the Corporation to make exceptions would go back to December 6, 1941.

We have also raised as a defense the press announcement Mr. Henry referred to, in which all claims for property "in transit" were directed to be filed with the Corporation by February, 1944. That was issued for publication. There was no provision in the statute for any statute of limitations, because it was not contemplated that anyone received any right to sue under the statute. They could sue under the policy. They had no right to sue otherwise. There was no provision at all. The Government agency was advised that the problem arose of how were we going to give people notice that they must get their claims on file? They did it by the issuance of a press release to the newspapers, to the press agencies, which said that claims should be filed prior to this date. [35]

At that time no claim had been received from Matson Navigation Company. This suit was not on file. The Corporation therefore has taken the position, as we have pled in our answer, that the claim is barred by time.

Now, we have some depositions which we wish to introduce in evidence. Our depositions in addition to covering the resolution of the Corporation which excludes losses of this type and other types, cover the administration of the Act under the ex-

isting W.D.C. law. The Courts in the construction of a statute—and this problem is one primarily of statutory construction—will give great weight to the construction of a statute that has been made by the administrative agency charged with the administration of it, and that is particularly so where the agency has been instrumental in the drafting and introduction of the statute itself.

The Court: Are these in the form of rulings in particular matters?

Mr. Charles: Yes, your Honor. It largely deals with the claims administration of the statute and the property that has been excluded.

The Court: In other words, they are just not merely argumentative statements of officials.

Mr. Charles: It will cover what has been done, and Counsel will have objections.

Mr. Henry: We will contend a large part of it, as [36] your Honor has commented.

The Court: I have had the question raised so many times concerning the OPA law as to what constituted an administrative interpretation, and I think most of the Courts hold that those interpretations had to be concrete, in the sense that before the Court would give them weight they had to be directed toward a set of facts in order to see whether or not from a judicial point of view they had relevancy to the matter the Court had under consideration and, secondly, if they were made by a person who had authority to make the interpretation. I haven't any idea what is in the deposition. I am just trying to find out the nature of it.

Mr. Charles: I think the requirements your Honor mentioned will be met by a large part of it, if not the whole of it.

The Court: Do you intend to read those depositions or is that a matter the Court can read when it considers the whole case?

Mr. Charles: I think it can be done either way, your Honor. We had planned, and I think Mr. Henry had contemplated that the depositions be read here and that the objections be urged at the time.

The Court: There are objections?

Mr. Henry: Yes, your Honor.

Mr. Charles: However, in view of your Honor's familiarity, [37] your Honor might prefer——

The Court: If there are objections that are made I think perhaps we had better dispose of them. It is too difficult to dispose of them afterward.

Mr. Charles: I think we are both prepared to argue them.

The other question deals with the phrase "property in transit." It is our position, as shown by the legislative history, those words were not intended to include anything but cargo, personal effects, currency, and things that could be carried, and the statute being an insurance statute, we wish to offer testimony and we have taken depositions bearing on the meaning of the words "property in transit" as understood in the marine insurance business, and with your Honor's permission at this time we will proceed with the introduction of our testimony.

The Court: The plaintiff has put on, so far as the facts are concerned, everything it needs?

Mr. Henry: That is right, only possible refutation, if any, which would come up by way of rebuttal.

ALFRED B. KNOWLES

called as a witness on behalf of the defendant; and being first duly sworn, testified as follows:

The Clerk: State your name to the Court.

A. Alfred B. Knowles. [38]

Direct Examination

By Mr. Charles:

Q. Mr. Knowles, could you tell us, please, what your present occupation and position is?

A. I am President of A. B. Knowles and Company, a corporation, United States and Canadian Marine General Agents for the Utah Home Fire Insurance Company of Salt Lake City, Utah; Pacific Coast General Agents for the Marine Department of the Millers National Insurance Company of Chicago, and British Columbia Marine General Agents for the London Scottish Insurance Corporation of England; and my corporation also acts in the capacity of Fire Insurance General Agents on the Pacific Coast for the Utah Home Fire Insurance Company.

Q. Is the work of your firm principally, however, marine insurance?

A. Principally marine insurance.

(Testimony of Alfred B. Knowles.)

Q. Could you tell us how long you have been in the marine insurance business?

A. I have been in the insurance business since 1915 and directly connected with marine insurance since 1919.

Q. May I ask you, Mr. Knowles, as to any other associations that you have had in the marine insurance business?

A. I have been on the board of directors of the Board of Marine Underwriters of San Francisco. I have held the position as President of the Board for two years. I am a member of the Average Adjusters' Association of the United States [39] and am a member of the various committees of the Board of Marine Underwriters at the present time.

Q. Since 1919 your business has been principally marine insurance, is that correct?

A. Principally marine insurance.

Q. Can you state where the principal marine insurance centers are in the United States?

A. In the United States the principal marine insurance centers are in New York and San Francisco.

Q. Are you familiar, Mr. Knowles, with the practices and usages in the marine insurance business? A. I am.

Q. Are you familiar with policy forms that are used in the marine insurance business?

Mr. Henry: Just a moment. I would like to introduce an objection here to any further testimony. I can see from the preliminary questions

(Testimony of Alfred B. Knowles.)

it is shaping up to where they are going to the point where an attempt is being made to obtain from this witness a statutory meaning to be given or a meaning to be given to a statute, and it is an attempt to invade the province of the Court. It is incompetent, irrelevant and immaterial, and has no bearing on the issues in this case; it is particularly an attempt to create ambiguity in the statute, which is clear on its face, not only from the legislative history of the statute. The purpose of any outside testimony like this is not to create ambiguities, and that is the only purpose that it seems to me any such testimony as this could be offered for: an attempt to create an ambiguity.

The Court: There is no jury sitting here. What do you intend to show by this witness?

Mr. Charles: We intend to show, your Honor, that in this statute, which is in effect an insurance statute, the language which was employed has a definite meaning in the insurance business, which limits it to a certain type of property as distinguished from a ship or a vehicle.

The Court: What particular language do you refer to?

Mr. Charles: We refer to the language "property in transit."

The Court: You want this witness to state what in his experience as an insurance man the term "property in transit" means to those who are engaged in the insurance business?

(Testimony of Alfred B. Knowles.)

Mr. Charles: Yes, in what connection the words "property in transit" would be employed. I would like to cite authority on that, your Honor. I am prepared to point out the relevancy and admissibility of the testimony.

The Court: Wouldn't it be more in the interest of time if the witness testifies and you make a motion to strike the testimony, and if that testimony is important and vital in the determination of the legal question involved, we [41] could give more time to it than just arguing it preliminarily now?

Mr. Henry: Very well, if that is your Honor's pleasure. I shall not repeat my objection, and it will be assumed, Mr. Charles, to be running to this entire line of questioning.

The Court: You have heard what his offer is.

Mr. Henry: Yes.

The Court: And you object to that on whatever grounds you wish to?

Mr. Henry: Yes. If I may repeat that, your Honor, so it will be perfectly clear in the record, I object on the ground it is incompetent, irrelevant and immaterial, having no bearing on the issues in this case, no proper foundation has been laid to show that Congress was acting as an insurance company, the members of Congress, when they wrote a simple statute here; that this witness cannot invade the proper province of the Court of interpreting the legislative enactments such as we have here. It is solely a question for the Court as to the meaning of this language, and not to permit

(Testimony of Alfred B. Knowles.)

testimony, a further objection, just to emphasize, not to recognize testimony that might be some conceivable device serve to try to create an ambiguity, in a statute which we consider is perfectly clear.

The Court: Inasmuch as I cannot tell at this moment how vital this is going to be to the determination of the legal [42] question, I think it would be better in the interest of justice to permit the witness to testify. I can see it cannot be very lengthy testimony. Then Counsel can make a motion to strike it out. I will reserve ruling on that and consider how vital it is. It may be if it were stricken out, for example, there would not be anything left in the defendant's case. I can't tell at this time.

Mr. Henry: Thank you, your Honor.

The Court: I will overrule the objection and Counsel can make a motion to strike after the testimony is in, and your objection may run to the entire testimony.

Mr. Henry: That is agreeable.

Mr. Charles: I can assure your Honor and opposing counsel that this is not a groundless offer. We have precise, well established authority, we believe, that covers the situation we have been discussing.

Q. (By Mr. Charles): Mr. Knowles, are you familiar with the terminology which is used by the marine insurance industry? A. Yes, I am.

Q. And your familiarity has gone back quite a number of years, has it?

A. A number of years.

(Testimony of Alfred B. Knowles.)

Q. Can you tell us whether the terms "in transit" are employed in the marine insurance business? A. Yes, they are. [43]

Q. Can you tell us in what connection and with what meaning the terms "in transit" are employed?

Mr. Henry: I object to that as calling for the conclusion of the witness, what the meaning is. That is not a proper question. The witness can state factually what his experience is, but not what the meaning is.

The Court: I think that does call for the conclusion of the witness. I think he may state in what respects that term is used. I think your question is subject to the objection and I will sustain it to that extent. I think you can reframe it.

Q. (By Mr. Charles): Can you tell us, Mr. Knowles, in what connection the terms "in transit" are employed in the marine insurance business?

A. The term "in transit" is applied to property which is being transported, namely, carried between points either by rail, by water, by airplane or other means of conveyance. It has to do with the property that is carried by some means of a carrying vehicle.

Q. Are those terms employed, Mr. Knowles, in connection with a vehicle or carrier or ship?

A. In our marine insurance business they are never employed with respect to the carrying vehicle, either ship or railroad car, as applied to a marine insurance policy.

(Testimony of Alfred B. Knowles.)

Q. Can you tell us whether the terms are found in any standard [44] marine insurance policies as a regular thing?

Mr. Henry: What terms?

Mr. Charles: The term "in transit."

The Witness: Yes, they are. They are found in various types of policies under which we cover merchandise, goods, that are actually "in transit" by a carrying vehicle; for example, on shipments moving by railroad cars we have one type of policy which is known as a "trip transit policy," covering a trip of merchandise, or a transit of merchandise by rail or motor truck between two certain points, and that is one type of policy, more or less standard. And we have also a cargo policy which covers shipments by water, various forms of cargo policies, and in those policies there is a phraseology which has to do with the property which is being carried and is described as being in the ordinary course of transit or "in transit" by a certain mode of vehicles or boats, ships.

Q. Do you find the term "in transit" used in ocean policies on ships? A. No.

Q. Mr. Knowles, how are ships insured—by that I mean, are they insured while they are en route from place to place, are they insured on a time basis, or how?

A. Generally speaking, ocean-going vessels are insured on a time basis, on an annual basis. On the other hand, during the [45] war and in writing war

(Testimony of Alfred B. Knowles.)

risk insurance, vessels were insured for shorter periods of time, usually three months, if a time limit was involved, or sometimes on a voyage basis between two points.

Q. And if they were insured on a voyage basis, how would that be phrased?

A. It would be phrased at and from San Francisco to the Hawaiian Islands and on her return voyage for not exceeding so many days in all, or not exceeding three months. Generally speaking, there was some time limit at which the return voyage should be completed.

Q. Have you ever seen the voyage described in any policy of marine or war risk insurance utilizing the terms "in transit" from, say, Honolulu to San Francisco?

A. I have never seen the words "in transit" used in connection with a policy on a ship except where a boat may be loaded on board another boat for transportation from one place to another, such as a small pleasure craft, as is very often done, shipped from the east coast to the west coast, where the small pleasure craft can be carried on deck. We would term that as being "in transit," because she is being transported, that is, being carried from one place to another.

Q. Would it be fair to state, then, that the phrase "property in transit" would never mean a ship to a man in the marine insurance business?

Mr. Henry: Just a moment. I am going to

(Testimony of Alfred B. Knowles.)

object to the question as leading and suggestive and calling for the conclusion of the witness, and again an attempt to invade the province of the Court beyond anything that was originally stated by Mr. Charles to be within the scope of his stated testimony.

Mr. Charles: If the Court please, I think this man's background is such that we are entitled to ask an opinion question with respect to the meaning which would be attributed to phrases.

The Court: You are offering this testimony as that of an expert in the field?

Mr. Charles: Yes.

The Court: Read the question.

(Question read.)

The Court: I will overrule the objection.

The Witness: No, it would never mean a ship moving under her own power from one place to another.

Mr. Charles: Thank you. That is all.

The Court: I think perhaps we had better take the noon recess now. We will reconvene at two o'clock.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [47]

Afternoon Session, April 30, 1947

2:00 o'Clock P.M.

ALFRED B. KNOWLES

recalled for the defendant;

Mr. Charles: If the Court please, we had just concluded the direct examination of Mr. Knowles.

Cross-Examination

By Mr. Henry:

Q. Mr. Knowles, I believe that you mentioned that ordinarily vessels are insured under marine insurance policies on a time basis; that is the customary practice, is that correct?

A. That is correct.

Q. So there is no occasion in any policy of that type to refer to the vessel being en route or "in transit" between any fixed termini, is that true?

A. Yes, that is true.

Q. In the somewhat rare instances that you mentioned of voyage hull policies, they are confined to the movement of the vessel between certain fixed termini, is that correct?

A. That is right.

Q. And that is defined as the extent of the coverage, is that true?

A. Yes.

Q. From one point to another point, is that right?

A. From one point to another point. [48]

Q. So that if in such a policy the language of the policy read, "to cover while the vessel is 'in transit' from Aukini, Hawaii to San Francisco,

(Testimony of Alfred B. Knowles.)

California," there would be no doubt in your mind as to the coverage of such a policy, would there?

A. If the policy were drawn that way, yes.

Q. It would be perfectly clear to you that it meant to cover for the time that the vessel was en route from Aukini to San Francisco, is that right?

A. That is right.

Q. I assume that you agree that a vessel is property, is that not true, Mr. Knowles?

Mr. Charles: I object to the question on the ground it is too general. It does not indicate whether the question means that the vessel be described as property in the marine insurance business or is it property in some other statute, or is it property in the general layman's view, or property in Webster's Dictionary. I think the question is objectionable until it is more definite.

The Court: Isn't that a matter that the Court could take judicial notice of?

Mr. Henry: I think that is true, your Honor, yes.

Q. But taking up Mr. Charles' suggestion, there is no question, is there, in your mind, Mr. Knowles, that in connection with marine insurance a vessel is to be considered as property? [49]

A. Well, it is not described as property in our marine insurance parlance. It is described as a hull.

Q. And only as a hull?

A. A hull and machinery and appurtenances, where we are insuring it under a hull policy.

(Testimony of Alfred B. Knowles.)

Q. And you never use the word "property" in a hull policy?

A. We would never describe the hull alone as property.

Q. Let us see. You mentioned hull, machinery and appurtenances. All of those together, hull, machinery and appurtenances, are property, isn't that right?

Mr. Charles: I object to the question on the ground it is argumentative.

The Court: It seems to me both the lawyers and the Judge are better qualified to answer that question than the witness.

Q. (By Mr. Henry): But the word "property" is never used in hull marine policies? A. No.

Q. I will read you the following clause, which I am reading from "American Hulls, Pacific Form of 1938," and ask you whether you agree that this is a correct statement of a common clause appearing in marine hull policies:

"In the event of expenditure for salvage—salvage charges are under the sue and labor clause—this policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value less loss and/or damage, if any, for which the underwriters are liable bears to the value of the salvaged property."

Isn't that a standard provision?

A. That is right. That is a standard provision.

(Testimony of Alfred B. Knowles.)

Q. So you would wish to modify your answer?

A. I will to that extent.

Q. I believe you mentioned, Mr. Knowles, that in connection with rail transportation there was merchandise that you ordinarily covered by insurance and that on ocean or marine carriage that there was cargo. It is a fact, isn't it, that both merchandise and cargo would in your opinion be an all-inclusive description of not only merchandise and goods, but of the vessel or railroad car as well?

A. May I have that question again?

(Question read.)

Mr. Charles: I object to the question. I do not think it is understandable.

The Court: It is not quite clear to me. Maybe the witness understands it.

Mr. Henry: If the witness understands it, I will leave it on that basis.

The Witness: I am sorry to admit I do not quite understand it.

Mr. Henry: I will withdraw the question. [51]

Q. Now, Mr. Knowles, you did not participate in any of the committee hearings on the floor of the House of Representatives or the Senate in connection with the preparation or drafting or consideration of this so-called War Damage Corporation Act, did you? A. No.

Q. Is the word "property" used in what you describe as marine cargo policies?

A. Well, I can't say offhand whether the word "property" is actually used.

(Testimony of Alfred B. Knowles.)

Q. Ordinarily you would use the word "merchandise or goods"?

A. "Merchandise or cargo."

Q. Or "goods," is that right?

A. Or "goods."

Mr. Henry: I think that is all.

Mr. Charles: That is all.

The Court: That is all.

FRED GALBREATH

called as a witness on behalf of the defendant; and being first duly sworn, testified as follows:

The Clerk: State your name to the Court?

A. Fred Galbreath.

Direct Examination

By Mr. Charles:

Q. Mr. Galbreath, in what business are you?

A. Marine insurance business.

Q. Could you state what your position or occupation in the industry is?

A. For the last fifteen or sixteen years I have been Pacific Manager of the Marine Office of America.

Q. Does that office do any underwriting of marine insurance? A. Yes.

Q. And is that the principal business of the Marine Office of America?

A. It is the principal business.

(Testimony of Fred Galbreath.)

Q. Can you tell us where the principal centers of the marine insurance underwriting business in the United States are located?

A. San Francisco and New York.

Q. Is your office the principal office on the west coast of your company?

A. It is one of the largest offices on the west coast and one of the largest in New York also.

Q. Do you do inland marine as well as ocean marine? A. Yes, sir.

Q. Do you handle any war risk insurance?

A. Yes, sir.

Q. Do you handle any cargo insurance?

A. That is the major portion of our business.

Q. Do you handle any hull insurance? [53]

A. Yes, we do.

Q. About how long have you been in the marine insurance business?

A. Twenty-seven or twenty-eight years.

Q. Have you a general familiarity with the practices and usages in the business?

A. I have.

Q. Are you familiar with the usage of marine insurance terms? A. Yes.

Mr. Henry: May I interrupt here out of an abundance of caution, your Honor, to say that the same objection runs to this line of testimony and is subject to the motion to strike that finally will be made on behalf of the plaintiff in this action as was mentioned in connection with Mr. Knowles' testimony?

(Testimony of Fred Galbreath.)

The Court: I assume this witness is an expert along the same or similar lines as Mr. Knowles.

Mr. Charles: That is correct, your Honor.

The Court: Very well. You may have an objection to this line of testimony, the same as the objection you urged before, and we will reach the matter in the same way as in the case of Mr. Knowles.

Mr. Henry: Thank you.

Q. (By Mr. Charles): Mr. Galbreath, have you or your company has any relationship or association with the Board of Marine [54] Underwriters of San Francisco?

A. Yes, I have served as a director on the Board.

Q. What is the general function of the Board of Marine Underwriters?

A. The general function of the Board is to make it possible for underwriters to organize various committees dealing with insurable matters, drafting of clauses and similar factors pertaining to our business.

Q. And that is a business rather than merely an honorary or club organization?

A. Oh, it is strictly a technical organization.

Q. And it employs surveyors and the principal underwriters belong to it, do they?

A. Yes, practically all the San Francisco market belongs to it.

Q. Have you been associated with any organization dealing in foreign trade, Mr. Galbreath?

A. Other than the Board?

Q. Other than the Board?

(Testimony of Fred Galbreath.)

A. I am affiliated with several organizations in San Francisco, including the Chamber of Commerce; President of the World Trade Association of the San Francisco Chamber and on various committees, both executive committees and organization committees.

Q. Are you familiar with policy forms used in marine insurance? [55] A. Yes, sir.

Q. Can you tell us whether those forms are to any extent standardized?

A. Practically all of the major clauses in marine insurance policies are standardized, both in the New York, San Francisco and London markets.

Q. Can you tell us whether property "in transit" is insured in marine policies?

A. Will you repeat that?

Q. Can you state whether or not property "in transit" is the subject of marine insurance?

A. In ocean cargo policies property is insured "in transit." The phrase "in transit" appears in the ocean cargo policies, and particularly in one clause which we call the "warehouse-to-warehouse" clause. The phrase is used to describe the commencement of the transit, and the phraseology in particular is "due course of transit."

Q. Is it utilized in any policies other than the general cargo policy?

A. It is utilized in our so-called "inland marine" policies, which are apart from ocean cargo policies.

(Testimony of Fred Galbreath.)

Q. And could you explain in what connection the term "in transit" is used in the inland marine policies?

A. For cargo or merchandise which is being transported by a carrier. For instance, if merchandise is moving by truck or [56] railroad car, it is commonly referred to as being "in transit," and our "trip transit" policies are built around that coverage.

Q. Are the terms "in transit" used in connection with the insurance of the hull of the ship?

A. No.

Q. Would your answer be the same whether the insurance were marine hull or war risk?

A. Yes, my answer would be the same.

Q. Can you state that positively, Mr. Galbreath, or is that a matter for judgment?

A. In all my experience I have never seen the phrase "in transit" used in any type of hull coverage, either war or marine hull.

Q. Have you ever seen the words "property in transit" used together?

A. On hull coverage?

Q. No, on any coverage.

A. I have seen it used in inland marine coverage. The word "property" could be used on ocean cargo policies. I have never seen it used in any hull policies at all, either inland or marine.

Q. You have never seen the word "property" used in the insurance clause as the subject of insurance in a hull policy?

(Testimony of Fred Galbreath.)

A. It is never used as the description of any hull. Under a [57] hull policy the word "hull" is used, and that is qualified, or, rather, broken down to describe the various features of the vessel, such as hull, tackle, apparel, furniture, machinery, and that is further broken down in the machinery end by saying "boilers machinery," and so forth and so on. But the word "property" is never used in the phraseology of describing the interest of an insured under a hull policy.

Q. Is it sometimes used in connection with a cargo policy? A. It is sometimes so used.

Q. Can you tell us, Mr. Galbreath, how a trip or journey is described in a hull policy?

A. At and from a certain point to a certain point.

Q. Hulls are insured, are they not, both under voyage policies and time policies?

A. The majority are insured under time and in special instances there are voyage policies.

Q. Would you say a voyage policy was an anachronism or is it something that is not infrequently found?

A. It is not common, but we do run across them every once in a while on a particular risk, where only a voyage policy would fit the picture. That is normally used where a venture pertains to a voyage. It is not a regular trade. If you wish me to elaborate, we have instances today before us where we have tugs going to the Orient, not to

(Testimony of Fred Galbreath.)

return. Therefore the hull insurance on those tugs or whatever vessel is going out is [58] only insured on that voyage basis. It would be customary, if it were going to be a regular trade pursued for months or years, to handle it on an annual basis and not on a voyage basis.

Q. In other words, would "in transit" be used to describe such a voyage to the Orient?

A. No.

Q. Referring to a cargo type of policy, are the words "in transit" used to describe the voyage, that is, the sea voyage?

A. No, they are not.

Q. Could you explain your answer?

A. The words "in transit," when used in an ocean cargo policy, are more or less a description of the time of attachment and course of the insurance. In other words, the words "in transit" are used in clauses which do not describe the particular voyage, but do describe the coverage under the policy. The voyage is always particularly shown in an ocean cargo policy reading by a certain vessel from and at, I think is the phraseology, we will say, San Francisco to a destination. And that is the way the voyage is typed into an ocean cargo policy.

The phraseology "in transit" or "in due course of transit" is in the insuring clauses or the body clauses of the policy showing the extent of the coverage. Other than that the policy is in effect

(Testimony of Fred Galbreath.)

during due course of transit, but the voyage is particularly described at and from San Francisco to its destination.

Q. Have you ever seen a policy where the words "in transit" were used in connection with any conveyance when operating under its own power?

A. I have not.

Q. Has this use of the words "in transit" that you speak of been in existence for any period of time, or is it recent?

A. It has been in existence during all my history in the business and long prior thereto.

Q. Is it reasonably widely known, or is it terminology that is applied only in certain instances?

A. The phraseology "in transit" is an integral part of the "warehouse-to-warehouse" clause, which is known all over the world as uniform wording.

Mr. Charles: That is all.

Cross-Examination

By Mr. Henry:

Q. Mr. Galbreath, you mentioned that in the policies that you are familiar with the particular place that the phrase "in transit" appears is in the warehouse-to-warehouse clause with some universal application, is that right?

A. Ocean cargo policies.

Q. Ocean cargo policies, yes. Isn't it a fact, Mr. Galbreath, that the purpose of that clause and the use of the phrase "in transit" is to extend what

(Testimony of Fred Galbreath.)

would ordinarily be the coverage under the basic form of ocean cargo policy so that it [60] covers a period of time when the merchandise is actually not in the course of transit, in the sense of movement, but is for purposes of the policy, even though at rest considered to be still subject to the coverage of the policy?

A. The only way I can answer that—I believe I understand your question.

Q. Would you try to answer it, Mr. Galbreath?

A. The words “in due course of transit” were inserted into an ocean cargo policy to amplify the “warehouse-to-warehouse” clause so that in the event there was an undue delay ashore, there would not be coverage under a marine policy. If once the cargo was loaded on the vessel, the words “in due course of transit” would of course not necessarily appear in the policy at all.

Q. That is right.

A. So therefore the words “in due course of transit” must arise solely because of coverage ashore. Therefore the words “in due course of transit” are coupled with a shore coverage, and not a vessel coverage.

Q. And they primarily cover a situation where the property, the merchandise or cargo that you have described, has come to rest physically rather than at a time when it is in the course of actual movement?

A. No, sir.

Q. Then it is a time prior to loading aboard and after discharge [61] from the vessel; in the “ware-

(Testimony of Fred Galbreath.)

house-to-warehouse" clause, Mr. Galbreath, I am referring to?

A. Yes. "In due course of transit" arose from the necessity of showing that property was covered ashore and under due course of transit while ashore.

Q. Before the actual ocean carriage commenced and after the actual ocean carriage ceased, is that right? A. That is right.

Q. So that if one were attempting to cover property while it was on the high seas and in movement between ocean ports, you would in customary practice not use the term "in transit" to cover that period of time, would you? A. You may.

Q. I am talking now about customary practice. That is not the connection in which you would use the phrase "in transit"?

A. That is correct.

Q. In other words, as you mentioned before, it applies primarily to shore risks as contrasted with ocean risks? A. That is right.

Q. Do you know of any ocean marine policy that covers marine risks for both property afloat and fixed structures ashore?

A. Would you mind repeating that?

Q. Yes. I might not have made myself clear.

A. I do not understand that.

(Question read.) [62]

A. Under one policy?

Q. Yes. A. No, I do not.

(Testimony of Fred Galbreath.)

Q. Now, this inland marine insurance that you refer to is entirely independent of and has no direct connection with ocean marine insurance?

A. That is correct.

Q. And that is in a large sense a fictitious term, in the sense that you describe it as being inland marine, but in a large majority of the cases it hasn't even any reference to water, is that right?

A. It could be more aptly described as transportation.

Q. Let us say in covering inland marine insurance, you cover with a personal property floater policy?

A. That is right.

Q. That has no reference to transportation?

A. When I speak of inland marine insurance, I was speaking of the use of the phraseology "in transit, and therefore I was only speaking of that type of policy where there is land transportation.

Q. But that would refer to the actual land movement and have no reference at all to the ocean?

A. It would refer to merchandise in transit, in the custody of some type of a carrier.

Q. It is a fact, isn't it, in your general cargo policies, [63] the customary reference to the property insured is cargo merchandise, is that correct, or goods?

A. Well, as a matter of fact, when you describe the interest insured you normally say 230 cases of canned goods.

(Testimony of Fred Galbreath.)

Q. That is what I mean. You do not use the word "property" in describing it?

A. Unless you have a long series of articles, in which you would say, "on the following property," and then you would describe the following property, if it is various types of merchandise, not all the same kind.

Q. In other words, where you want to be all-inclusive, you use the term "property," is that right? A. Yes.

Q. And the same thing is true, is it not, in connection with hull insurance: As you mentioned, it is broken down between hull, machinery and appurtenances, and then even some further breakdowns in that, is that correct?

A. Yes, but the word "property" is not used.

Q. Never in connection with an all-inclusive description of the subject-matter of the insurance?

A. It is never used in connection with the description of the insuring interest on the face of the policy.

Q. But on occasions or in instances there is reference in hull policies to the word "property," where the entire vessel, that is, the vessel, the hull, the machinery, appurtenances, [64] and so forth are referred to?

A. In the Sue and Labor Clause the word "property" is used in two places. In the first instance the word "property" is used that the owner has permission to sue and labor, and so forth; and

(Testimony of Fred Galbreath.)

in the second place it is used not as a description of the vessel but of the entire property, which would include cargoes. That is why they use the word "property" in that second instance.

Q. But in the first instance they are referring to the vessel, machinery and appurtenances as contrasted with any cargo?

A. And perhaps freight, too. I think it refers to interests of the shipowner, no matter what they are.

Q. And that is the general subject-matter of the policy, isn't that right?

A. The general subject-matter of the policy is on the hull and equipment, and those interests which are insured. The hull policy would not include freight.

Q. Unless you specifically mentioned it, isn't that right?

A. No, freight would not be included under that particular hull policy. Freight is——

Q. An intangible, isn't it?

A. An intangible.

Q. And something that the vessel owner has to specifically arrange for?

A. Under a separate policy.

Q. The use of the word "property" under the standard hull [65] policy is not for the purpose of either including or excluding coverage on freight, is that true? A. That is correct.

(Testimony of Fred Galbreath.)

Q. Does the ordinary hull voyage policy, which you say is issued on occasion, cover for any period of time when the vessel is not actually en route or moving?

A. That would depend upon the risk and what the particular underwriter wished to do.

Q. If the language that you mentioned in the opening part of the policy was, as far as cargo insurance is concerned, at and from a certain point to a certain other point—is that correct?

A. That is correct.

Q. So the “at” would cover a period of time when the vessel was not actually moving, is that correct?

A. If it was on a voyage, the voyage would commence at a port at the instant it started to move.

Q. It has to start to move, is that it?

A. Yes.

Q. Then it ceases when the vessel arrives at the port of destination, is that right?

A. Usually an underwriter will have the phraseology of “until moored in good safety,” or for 48 hours or 72 hours after being moored in good safety, some such qualification.

Q. But if there is a time period beyond the actual mooring, [66] then such a policy would cover for the period of time when the vessel was not actually moving or “in transit,” is that right?

A. In accordance with the phraseology contained in the policy.

(Testimony of Fred Galbreath.)

Q. Incidentally, Mr. Galbreath, you did not consult with or were not consulted with or did not advise the committee, or either committee in Congress, or any of the Members of Congress, with regard to this legislation, did you?

A. They did not see fit to call on me.

Mr. Henry: That is all.

Redirect Examination

By Mr. Charles:

Q. Mr. Galbreath, is inland marine insurance applied at all to the coastwise movement by water?

A. On the East Coast they have a type of inland marine policy which does cover coastwise movements of cargo. It is a trip transit policy extended to cover ocean cargo coastwise.

Q. When you speak of a "trip transit policy," can you tell us whether that terminology is ever applied to anything other than goods and things carried? A. It is not.

Q. On your cross-examination I was not quite sure what you said, whether the words "in transit" were used merely to extend the policy from the port to the warehouse, or whether the phrase was really intended to cover during the entire voyage from the warehouse on one side to the warehouse on the other.

A. The clause in which that phrase "in transit" appears is [67] one which appears is one which covers the merchandise insured, from the time it

(Testimony of Fred Galbreath.)

leaves the place, the warehouse, place of manufacture—the warehouse at port of shipment or place of shipment to the warehouse at destination. Therefore it must necessarily cover the entire venture. The words “in transit” are phrased for inland coverages, as in an inland marine policy, and they cover the transit on land likewise. But the phrase is in the whole journey, from one end to the other, in that warehouse-to-warehouse clause.

Q. And it is utilized in the ocean cargo policies?

A. It is, the warehouse-to-warehouse clause. It is likewise used in the marine extension clause, which for the past several years has been an integral part of an ocean marine policy. It is in those two clauses that the phrase “in transit” appears.

Mr. Charles: That is all.

The Court: That is all.

Mr. Charles: If the Court please, we have on this subject four depositions which we took in New York of four insurance men, three of them marine insurance men, and one a man familiar with railroad insurance, and in view of the fact that this testimony is largely cumulative, although important, I might suggest to the court that in the interest of time we might offer the depositions with the understanding that the same objections would be reserved. The objections for the most part are expressed in the deposition, but in case they are not we would be agreeable to the same understand-

ing we had with respect to the witness' testimony in court. I think that might save some time that way.

The Court: Is that agreeable to you?

Mr. Henry: That is agreeable, your Honor. The only thing I want to be doubly certain about, both from the standpoint of opposing counsel's thoughts in the matter and primarily the court's thoughts in the matter, is the time which would be appropriate to make a motion to strike. Of course, I can make the motion to strike right now, but I assume it would be the pleasure of the court to let that phase of the case go on. I am prepared to make such a motion right now.

The Court: Before you make the motion, let the depositions of these four men, Inselman, Pease, Cann and Wayne, be admitted and deemed read, subject to the same objections that you made in the case of the testimony of Knowles and Galbreath.

Mr. Henry: Yes.

The Court: Then it may be admitted under those conditions.

Mr. Henry: Yes.

The Court: Will that constitute your testimony of the expert witnesses on this matter of the meaning of these words, "in transit"?

Mr. Charles: That is complete, your Honor.

The Court: Now, I think you might, for the sake of the record, make your motion.

Mr. Henry: Thank you, your Honor. I wish to make a motion, and do move to strike the testimony

of Mr. Knowles and Mr. Galbreath, and the testimony of Mr. Inselman, Mr. Pease, Mr. Cann and Mr. Wayne, the last four being under deposition, for the reasons stated in the objections to the testimony of Mr. Knowles and Mr. Galbreath; that the testimony is without proper foundation, there is no showing that these witnesses or that Congress, itself, had any consultation or advised with these people; that it is an attempt to invade the province of the court to construe what we consider to be the clear language of the statute; that it is self-serving; that it is a matter not within any of the issues of this case and, as I mentioned before, an attempt to invade the province of the court and an attempt to create an ambiguity where there is none on the face of the statute.

The Court: The upshot of the testimony of these witnesses is merely that as to the language contained in the policies, with which they are familiar, policies of marine insurance, and the fact that certain terms are not included in insurance policies in their field of knowledge and experience; so that the witnesses have really testified to what insurance policies contain and what they do not contain under certain conditions. Assuming the court were or were not to consider that testimony [70] in resolving this issue, wouldn't whatever you have to say go to the weight of that testimony rather than to any question of admissibility? Is it worth anything, granted that it is so, is it worth anything or not in resolving the main question?

Mr. Henry: In large part that is true, your Honor, except since it so clearly in our opinion has no weight, that it is irrelevant, and that it has no bearing in the solution of the issues in this case.

The Court: I suppose if the testimony has no weight at all, it might come into the category of immaterial or incompetent testimony, for that reason. All the witnesses have testified to what is in and what is not in an insurance policy. Whether those facts have a bearing on or were taken into account by the framers of this legislation or by those interpreting the legislation, by making administrative rulings and the like, might be a different question. I do not know. I think perhaps we might leave the matter in reserve until I really see if it has relevancy. If it has no relevancy in the long run to the main issue, then it should go out; if not formally, at least it will not be considered by the court in arriving at a decision. But it would seem to me better to wait until the whole matter is presented and see whether it is so vital that, whether it goes in or out, will have a bearing on the decision. Then I think I ought to weigh it. I think it is best for the court to reserve ruling on it, and then you can [71] make whatever comment you want on the briefs.

Mr. Charles: I would like briefly, if I may, to reply to the question as to the admissibility of this line of testimony without arguing the case. I would like to say it is our view that the testimony is somewhat broader than what your Honor mentioned. It

seems to us that we have established throughout by the witnesses and through the depositions that the words "in transit" have a very definite meaning in the marine insurance business; that it was used in connection with insurance on goods, and never in connection with insurance on vehicles, and it is true the direct testimony has been with respect to usages and policies, but, after all, that is the way in which the insurance people do business. But I would venture to say, if your Honor ever asked any insurance man whether "in transit" ever applied to ships, he would say, "You are crazy," simply because through its usages in policies it has acquired a very definite insurance conception, and it is for that reason that we offer it in connection with the construction of the statute, in support of the legislative history, which shows that when the amendment was suggested the men who asked that the amendment go in were considering the insurance only of goods and cargoes and merchandise, and it is almost inconceivable. If I may argue—

The Court: I do not want to interrupt you, Mr. Charles, but I understand the point you are making. However, I think [72] probably your opponent would agree with you that this matter that has been testified to is probably quite true so far as the general insurance field is concerned, but the question we have to consider is the impact of that upon the issue in this case. I am not prejudging that in any way. That is why I suggested that we reserve that, and inasmuch as both sides seem to consider that of importance, argue that in the brief.

Mr. Charles: Let me just briefly say the rule is expressed in most authorities that where a statute relates to a particular phase of a business or profession and terms are utilized in the statute, that evidence is admissible to show what meaning the terms have in the business, and the courts will go this far: The courts will say, "You may have certain words which have a general meaning of one kind, but when it is used in a statute which deals with a particular business, such as the insurance business—and we have such cases—that the meaning of the words in that business are the words to be applied."

Our Ninth Circuit Court of Appeals, in a fairly recent case, applied that rule. The question arose under a statute as to what was the meaning of carbonated beverages, and the testimony showed that generally beer was considered a carbonated beverage, so defined generally in dictionaries. But expert testimony was put on to the effect that "carbonated beverages" as used in the business did not include beer. [73]

And similarly, in insurance statutes we find the same rule applied. We find the cases also which permit the testimony as to the meaning of terms as distinguished from what might be deemed to be usage, which might not require quite the same foundation, such as in a New York case in which the question arose on a contract policy as to the meaning of the words "port risk," and there testimony was admitted by the court. So the courts have

laid a great deal of weight on the testimony of experts in the business as to what phrases are used, and, after all, this was an insurance statute. Congress was giving powers, giving money to a corporation known as the War Insurance Corporation originally. Its sole purpose was the issuance of insurance and this free protection.

Mr. Henry: Under the suggestion of the Court, we are merely reserving any comment.

The Court: I think this matter you are discussing is really a part of the main issue of the case, itself, and I am not going to decide the case, itself, under any condition on a motion to strike.

Mr. Charles: If the Court please, our next testimony deals with the administrative interpretations of the Act and includes the deposition of the Secretary of the War Damage Corporation, through whom we will offer the resolution of the corporation which excludes ships from the coverage of the Act, among other things, and in view of the several subjects [74] that are covered by the deposition and the objections that counsel has made and will make to them, I think it would be desirable to read this deposition.

The Court: Very well.

Mr. Charles: Your Honor, will it be agreeable to have Mr. Ransom read the answers?

The Court: Any way you wish to proceed. I have found that until you get to a point that is critical or reaches an objection, sometimes the attorneys can state the substance of it quicker; but

whichever suits your convenience in best presenting what you have in mind will be satisfactory as far as the court is concerned.

Mr. Charles: If the court approves, I will follow your suggestion.

The Court: Is there any copy available that I could follow?

Mr. Henry: Mr. Charles, I will read from my copy as against your answers.

Mr. Charles: If the Court please, this first deposition is that of the Secretary of the War Damage Corporation, Mr. Knarr. The first questions are preliminary, until we get to page 3, where the question is asked Mr. Knarr about the eighth line as to whether any regulations have been passed by the War Damage Corporation, and he says, "Yes, Regulations A on the general program," and then we have offered in evidence a copy of Regulation A, which I believe is attached to the deposition, [75] to the original deposition which your Honor has.

Mr. Henry: Exhibit 1 For Identification.

The Court: Exhibit 1 to the deposition is the same as the exhibit attached to your answer?

Mr. Charles: That is correct.

The Court: That is the regulations effective July 1, 1942.

Mr. Charles: That is true, and the regulations, as counsel's objections show, state expressly that they are effective July 1, 1942. They apply to the general program, and as our later resolution shows, they were used as a guide in the disposition of the claims.

The Court: Do you object to this?

Mr. Henry: Yes, I object to that on the ground the regulations, by their own terms, state that they are effective July 1, 1942; that they could not by their own terms be applicable between December 6, 1941, and July 1, 1942; that the Act, itself, expressly provides that this insurance program under which policies are issued and premiums are charged was to go into effect on a date determined by the Secretary of Commerce, which is July 1, 1942. All of those regulations refer to policies to be issued in the future, and it is our position that on the face of the exhibit, itself, with the offered exhibit, itself, they could not apply with any force at all to the situation existing before July 1, 1942.

Mr. Charles: The answer to that, if the Court please, is [76] found in another exhibit attached to the deposition, which are the minutes of the meeting of the executive committee on October 2, 1944, at which time the resolution expressly applicable to the free protection was passed, and which I would like to read, after omitting a preliminary statement of who was present at the meeting. Mr. Claussen was present——

Mr. Henry: Just a moment. I am not certain that I understand this. You are now talking about another exhibit, Mr. Charles, and my objection, of course, went to the particular exhibit No. 1 For Identification, which was for the period subsequent to July 1, 1942, and where policies were actually issued and premiums actually paid, and that hasn't any application to the period under B of the War Damage Corporation Act.

Incidentally, your Honor, I think I neglected to point out in the consideration of the War Damage Corporation Act, itself, in (b), the opening statement is:

“Subject to the authorizations and limitations prescribed in subsection (a).”

There is no express grant in subdivision (b) of a power to exclude for the free period.

The Court: Your point is that the statute gives the War Damage Corporation the right to limit the coverage after July 1, 1942.

Mr. Henry: That is right. [77]

The Court: But it has no power to exclude anything from coverage during the period prior?

Mr. Henry: That is correct, your Honor, under the language of the statute.

The Court: Your interpretation of the statute is that everything was covered, that there was no way by which the War Damage Corporation could exclude anything?

Mr. Charles: Assuming that the property fell within the statutory description of the property that was subject to coverage.

The Court: The only description in subdivision (b) is to any such property.

Mr. Henry: That is right, and that goes back to all real and personal property in the United States and its possessions and in transit between ports in the United States and its possessions, your Honor.

Mr. Charles: I must take exception to that.

The Court: But the corporation was given power to make exclusions, wasn't it?

Mr. Henry: After July 1, 1942, your Honor.

Mr. Charles: I do not want to argue the matter, your Honor.

The Court: I just wanted to get this clear. Your contention is that anybody who had any kind of property, real or personal, within the areas or in the places fixed in this statute [78] in the first six months' period was protected under the statute?

Mr. Henry: Yes, your Honor.

The Court: And that no personal or real property of any kind could be excluded in that six-months' period.

Mr. Henry: Subject to the terms as to what property was covered in the statute, itself.

The Court: But according to your contention all real and personal property which was in certain places was covered in this six-months' period.

Mr. Henry: And property "in transit" between those ports.

The Court: And property "in transit" between those ports.

Mr. Henry: Yes.

The Court: Was covered under that provision.

Mr. Henry: That is correct, your Honor.

The Court: And that the corporation had no power to exclude anything for that first six-months' period?

Mr. Henry: Yes, and in the alternative, our position is that they had no power, even assum-

ing there was any power to exclude there; the attempt to exclude in the fashion they did was not available to them.

The Court: You are talking about the retroactive phase of it?

Mr. Henry: The retroactive phase of it, and the fact that this was not, even assuming there was authority for general exclusions prior to July 1, 1942, this kind of exclusion that they made was not a general exclusion within the terms [79] of the statute. I just want to make it clear that I am relying on both grounds.

The Court: I would offhand think you had kind of a heavy burden to carry there in urging that by this statute, which under subdivision (b), referring to the same property, providing that injured parties may be compensated during the six months' period following the war for that same property, the property referred to in subdivision (a), that that was intended to give greater rights to the persons who might be damaged than to those who subsequently took out insurance and paid premiums for it.

Mr. Henry: In this respect, to show your Honor what I have in mind there: After July 1, 1942, it was on a straight contract basis, where the applicant could apply for insurance and the War Damage Corporation could grant insurance under the general terms that might be set up. In other words, the parties were contracting there for specific things. It was a proposal, let us say, from the stand-

point of acceptance by the corporation, whereas you had during this period from December 6th to July 1st, 1942, a situation where the great mass of the people, of course, did not know all the details of what might be involved here, and acting on the basis of equality, you might say, the Congress, in our judgment, very wisely provided that there was this war coverage. Mind you, that date could have been cut off to an earlier date than [80] July 1, 1942. It could be any date between the date of the Act, March 27, 1942, and July 1, 1942. So that you do not have the situation where there was a blanket commitment that could run on, first of all, for any appreciable time and was not subject to reasonable control, and they all knew substantially what happened up to March 27, 1942. So there wasn't any blind commitment by the Government in that respect.

The Court: I can see we could get into perhaps considerable argument on this subject. It brings out what the contentions are by discussing it, somewhat. Perhaps we had better let the argument go until later. I think I shall allow these various documents to go in evidence, particularly this exhibit. I think if I exclude any one of these exhibits, then I haven't before me the clay with which to work. I am not going to work in the dark, and if we were to argue this matter now as to the admissibility of it, we are more or less determining the case because some of the relevant material may be left out.

Mr. Henry: I just wanted to be certain my objection was registered, your Honor.

The Court: Very well, you have your objection in the record. I will admit Exhibit 1 in evidence, Defendant's Exhibit 1 in the deposition of Mr. Knarr.

Mr. Charles: Secretary of the War Damage Corporation. Following that there are two amendments to the regulation (a), neither of which are pertinent to the particular problem which [81] we are considering here.

The Court: One effective July 1 and one effective October 1, is that right?

Mr. Charles: That is correct.

The Court: Exhibits 2 and 3.

Mr. Charles: Yes, and the approval of the Secretary of Commerce to the regulations (a) and the Amendments——

The Court: Do you wish them in evidence?

Mr. Charles: The Secretary has stated that they were approved by the Secretary of Commerce.

The Court: I do not know what the weight of them is, and how important they are. I will give them such weight as they are entitled to, depending upon their relevancy. They may be admitted. I do not think the Clerk need mark them. What we have said I think covers the matter. They are admitted in evidence as part of the deposition of the witness Knarr.

Mr. Charles: Page 10. We offer in evidence the Resolution of October 2, 1944.

Mr. Henry: That expressly refers to the free protection provided for by subdivision (b) of the statute.

The Court: Subject to the objection that has been made as to its competency and relevancy and the other legal objections that have been urged, it may be admitted as a part of the deposition.

Mr. Charles: Now, in addition, on page 11, I should like to offer also, your Honor, the minutes of the Executive Committee, [82] War Damage Corporation, October 2, 1944, in which this resolution appears, the minutes of the meeting referring to the reasons for the passage of the resolution, and I believe a photostatic copy is attached to the original deposition.

The Court: Isn't that what we just admitted?

Mr. Henry: That is what I thought.

The Court: You were referring only to the resolution that is contained in these minutes?

Mr. Charles: I thought we offered the resolutions separately. Page 10 appears to indicate that.

The Court: You want the whole minutes of the meeting to go in?

Mr. Charles: That is correct.

The Court: Subject to the same objection they may be admitted.

Mr. Henry: Thank you, your Honor. I just wanted to call the court's attention to the fact that these minutes show that the immediate or prompting cause for the adoption of that resolution on October 2, 1944, as appears in the minutes, was

because they had received a claim for the Union Oil tanker, which is something of rather amazing significance to me to adopt a resolution when they receive a claim, which has the effect of eliminating any coverage for vessels.

Mr. Charles: Your Honor, I must protest counsel's statement, and in view of the impression which it may have [83] made on your Honor I would like at this time briefly to read the very resolution to which counsel refers. It is true that the matter of the claim of the Union Oil Company was one of the motivating factors, but the resolution was a great deal broader and more important than that, and it so expressed.

Mr. Henry: I think I may have given you the wrong impression, and I hope I did not give the court that impression. I was not talking about the text of the resolution, itself. I was calling attention to the minutes and the language in the minutes that immediately preceding the resolution that was offered——

Mr. Charles: If the Court please, I am again going to protest that because as the document shows and states, Mr. Klossner, President, suggested that, "Before beginning the investigation of the principal group of claims for which the corporation is charged with responsibility (i.e., those arising in the Philippine area), it may be advisable to consolidate and clarify the corporation's record with respect to the protection extended in connection with losses occurring before July 1,

1942. Mr. Klossner called the attention of the Directors to the following matters: That on December 13th and December 22nd, 1941, the Board of Directors of this corporation approved two press releases of the Federal Loan Administrator which announced that reasonable protection would be provided by this corporation with respect to loss of or damage to property resulting from [84] enemy attack, and expressly excluded from such protection certain classes of property."

Then they go on to say in the next paragraph that Regulations A have provided exclusions and that those have been used as a guide with respect to the free protection, and then the statement to which counsel refers, and only then:

"Mr. Klossner stated that a question recently had been raised by a claimant as to whether this corporation might be under legal obligation to make compensation for the hulls, equipment and cargoes of vessels lost by enemy attack," and so forth.

That was not the plaintiff's claim. It was the Union Oil claim, the plaintiff's claim not having been filed up to that time. But the resolution was a great deal broader, as the court will see. It excluded great numbers of types of property, only one of which appears on page 216—

The Court: I think I will have to read that more carefully at the time of the submission.

Mr. Charles: On page 11 we have offered in evidence—I do not have a copy of it here—the public announcement.

The Court: That is attached as Exhibit 5 to the deposition, is it not?

Mr. Charles: Yes.

The Court: That is the press release you referred to.

Mr. Charles: That is the press release which directed [85] the filing of claims by February 1, 1943, and our defense is based upon the fact that this claim was not filed by Matson until after that date.

Mr. Henry: I would like to make a particular objection to that, your Honor, on the basis that it is incompetent, irrelevant, and immaterial; that by the terms of the press release, itself, assuming you have conditions laid down binding on parties by a mere press release, they do not amount to any bar to the plaintiff's rights in this matter. The press release simply says that claims should be filed by February 1, 1943, and it is our contention, your Honor, that that cannot operate as a bar, and there is no showing at all that it has any bearing at all on the issues in this case under any proper consideration.

Mr. Charles: If the Court please, we have, as mentioned this morning, a rather unique situation——

The Court: I think I recall what you said on that. Subject to the objection that has been made I will allow the exhibit to be marked and considered in evidence.

Mr. Charles: In that connection we should like also to offer in evidence a stipulation, a written stip-

ulation to the effect that a statement of the substance, but in different language, of this announcement was published in the New York Journal of Commerce on December 31, 1942, and there is attached hereto a photographic copy of the Journal of Commerce of that day. The objections are reserved in the stipulation. [86] The stipulation further covers the fact that three subscriptions to the Journal of Commerce were taken by Matson Navigation Company at that time. The subscriptions were sent to three addresses: At 215 Market, one at 30 Rockefeller Place, and a third at 913 Southern Building, Washington, D. C., and a fourth at 480 Main Street, San Francisco. We will offer that with the understanding, of course, that counsel's objections are reserved.

Mr. Henry: It seems to me we are reaching a point on this one where it would not be inappropriate to ask for a ruling. Here is a private unofficial publication that contains a news item that is not in the language, even, of the present release, and that certainly seems to me to be a particularly wild thing to consider that that would establish a statute of limitations, self-concocted, if I can put it that way, without any invidious intent upon the War Damage Corporation, a self-concocted statute of limitations without any authorization in the statute, and the fact that it appeared in a paper in different language from the press release, itself.

Mr. Charles: I would like to say in answer to that we have here not a case where the Government

has had a contractual relationship with another party, as would be the case with a policy written by the Maritime Commission, or one written by War Damage Corporation, where such a notice would be clearly insufficient. Counsel's objections would be pertinent. The [S7] fact here, however, is that the Government has indicated a willingness to pay certain types of free compensation. They do not know who the claimants are. They have no way of communicating with these claimants. It is not like the situation where notice could be posted on real property. The notice is not the type of notice to be posted in the Federal Register, and the corporation, as the testimony shows in Mr. Knarr's deposition, did this: They issued this press announcement, and they issued it to the press representatives in Washington. Of course, they could not control what use was made of it and what use was not made of it. We have used the Journal of Commerce in which this appears as it was a publication in one of the principal cities, and which is given general circulation, as indicated by the fact that the Matson has subscribed to it. But this Government agency is not going to be able to rely on a statute terminating the filing of claims. Therefore, that administrative agency has got to sometime decide that the claim should not be considered because of laches, because it is late, and every reason that would exist in the case of an insurance company exists in the case of the Government, and it seems to me that any reasonable notice, for which the publication is offered, was about all they could do, and in view of the fact that

this claim was filed so long after Pearl Harbor, and so long after the Matson Navigation Company must have known their ship was lost, that the action taken by the administrative [88] agency, to whom this power and authority has been given, seems to me very reasonable.

The Court: Do you urge that there is any statute of limitations at all?

Mr. Henry: Oh, there is the statute of limitations; in California it is the three-year statute, and we are not barred by that statute of limitations in actions arising under this statute. I mean there is no statute of limitations under the War Damage Corporation Act, and I think Mr. Charles recognizes that, himself, in the language of the Act, itself. There are statutes of limitations that apply to the bringing of actions, yes.

The Court: This case was filed——

Mr. Henry: It was filed in time. There is no contention, your Honor, that there was any statute of limitations in the ordinary legal sense of the word that would in any way bar us.

The Court: You filed your case within about three years of the date the statute would run.

Mr. Henry: That is right.

The Court: The statute was enacted——

Mr. Henry: March 27, 1942.

The Court: And you filed the action on March 22nd, 1945.

Mr. Henry: That is correct.

The Court: You are of the view the California law applies? [89]

Mr. Henry: I think that is correct, your Honor. There is no contention we are barred by any statute of limitations in this action, unless there is a statute of limitations in a sense by some press release, or something like that, where the War Damage Corporation tried to bar claims by some press release.

The Court: Whether this statement by the War Damage Corporation was operative or not, at least I would have to have it before me to decide whether it was operative or not.

Mr. Henry: I guess it goes the same way as the others.

The Court: I think so. You say I ought to make a ruling on it.

Mr. Henry: I am talking now about this private publication.

The Court: I would not be particularly disturbed about making a ruling on it. After I have considered the case I might want to change it.

Mr. Henry: I think you have the actual press release. What I was objecting to primarily before your Honor now was the introduction of this private publication, to clutter the record, in a sense, which is not even in the language of the press release appearing in an unofficial publication as having any probative value to the issues of this case.

The Court: I think perhaps counsel's purpose is to show that the corporation came to the conclusion to do this, and it [90] endeavored in some manner to reach the public in connection with that. I think that probably is what counsel has in mind. I think

I would have to know what was done in order to see what the legal effect of it was. It may have no legal effect. On the other hand, it may have some. I do not think it unduly clutters the record. I will overrule the objection under the stipulation.

Mr. Charles: I think, your Honor, that that covers all the exhibits that are referred to in the depositions of Mr. Wayne and Mr. Goodale.

The next deposition is that of R. C. Goodale, who is the General Counsel of War Damage Corporation, and in charge of the handling of claims for the corporation.

The Court: What page is that on?

Mr. Charles: That appears on page 28.

The Court: I have it. I think we will take a short recess.

(Recess.)

Mr. Henry: If the Court please, I spoke to Mr. Charles during the recess and he was agreeable, if it was agreeable to your Honor, that I call two very brief witnesses. It will be somewhat out of order, just to get them on and off the stand, if I may, before we proceed with Mr. Goodale's deposition.

The Court: Yes. [91]

THERON L. PRENTISS

called as a witness on behalf of Plaintiff in Rebuttal, and being first duly sworn, testified as follows:

Q. (By Mr. Henry): Mr. Prentiss, I will ask you a few leading questions and try to shorten this.

(Testimony of Theron L. Prentiss.)

You are employed by the insurance brokerage firm of Marsh & McLennan, are you?

A. That is correct.

Q. That is one of the largest firms in the United States, is that right? A. Yes.

Q. For how long have you been employed by them, approximately? A. 28 years.

Q. Specializing in marine insurance?

A. Yes, sir.

Q. Where has your employment been? In San Francisco, or elsewhere?

A. New York and San Francisco.

Q. Both places? A. Yes, sir.

Q. During that full period of time you have been connected with the phase of their business that is connected with marine insurance, is that right?

A. Yes, sir.

Q. You are a member of the Society of Average Adjusters, are you? A. Yes, sir. [92]

Q. If that is the correct title; and you are familiar with general forms of marine insurance of all types, are you? A. Yes, sir.

Q. Hull, cargo, and every type, is that correct?

A. Yes, sir.

Q. Can you tell us whether it is a frequent or infrequent occurrence in marine hull policies to refer to the vessels as property?

A. Quite frequent.

Q. Now, in connection with the types of hull policies, is it correct that the great majority of the hull policies are on a time basis? A. Yes, sir.

(Testimony of Theron L. Prentiss.)

Q. And that they cover the property insured, whether or not it is moving or "in transit," is that correct? A. Yes, sir.

Q. In connection with the less frequent type of hull policy which has been referred to here as a voyage policy, is it common for such voyage policies, or is it uncommon for such voyage policies to cover the vessel, the property insured, at times or for occasions when it is actually not "in transit" or moving? A. It is customary.

Q. To cover it when the vessel may be stationary or not actually on her voyage, is that correct?

A. Yes, sir. [93]

Mr. Henry: That is all.

Cross-Examination

By Mr. Charles:

Q. Mr. Prentiss, you spoke of the word "property" appearing in the hull policy. Now, does that word appear in the Sue and Labor clause, or is it used as a word to describe the ship and her equipment?

A. The ordinary hull policy, it appears in the Sue and Labor clause; it also appears in the Perils clause and it appears in the Collision clause.

Q. None of those clauses in which the property covered by the insurance is described, are they?

A. No.

Q. Mr. Prentiss, you were here in court, I think, when Mr. Galbreath and Mr. Knowles testified this morning and this afternoon? A. Yes, sir.

(Testimony of Theron L. Prentiss.)

Q. You heard their testimony, did you?

A. Yes.

Q. Could you tell us whether the statements that they made with reference to the use of the words "in transit" with reference to things carried as distinguished from the vehicle are in accordance with your understanding?

A. I would not say so.

Q. You would not say so? A. No. [94]

Q. Can you tell us, would it be correct to say, then, that you disagree with the substance of the testimony of those men?

A. Not the substance of it, no.

Q. Can you tell me, with your familiarity with insurance, if somebody spoke of a ship "in transit" would you consider it an insurance expression?

A. I would not say that it was an insurance expression, but I would certainly understand what was meant by the term, I think. [94-a]

Q. In fact, wouldn't you throw up your hands and say, "You never see that in connection with a ship. You are only talking about cargo"?

A. No, I would not say that.

Q. You would not think that that was a misuse of the term? A. No.

Q. Mr. Prentiss, I wonder if you know of Mr. George Inselman of the Marine Office of America?

A. Yes, I know him.

Q. If you knew his testimony was the same you would disagree with him, too, would you?

A. Yes.

(Testimony of Theron L. Prentiss.)

Q. Do you know Mr. Pease, the American manager of the British Foreign in New York?

A. Yes.

Q. If that was the substance of his testimony you would still disagree? A. Yes.

Q. Do you know Homer Wayne of the Albert Wilcox Company? A. Yes.

Q. If that was the substance of his testimony you would still disagree with that? A. Yes.

Mr. Charles: I think that is all.

Mr. Henry: That is all. Thank you. [95]

MELVIN PRICE

called as a witness on behalf of the plaintiff in rebuttal; and having been first duly sworn, testified as follows:

The Clerk: State your name to the Court, please. A. Melvin Price.

Direct Examination

By Mr. Henry:

Q. Mr. Price, you are employed by the Matson Navigation Company? A. Yes.

Q. The plaintiff in this action. Were you employed by the Matson Navigation Company in December, 1942? A. Yes.

Q. And you had been employed by them for several months prior to that, is that right?

A. Yes.

Q. And you have been employed by them steadily ever since, is that correct? A. Yes.

(Testimony of Melvin Price.)

Q. Your employment with them is that of insurance manager? A. Correct.

Q. And all matters of insurance are referred to you, is that correct? A. Yes.

Q. I will show you a photostatic copy of the Journal of Commerce and Commercial News dated December 31, 1942, Page 3, [96] and particularly an article headed there, "WDC to Consider Claim for Losses," and ask whether you ever read that article? A. No, I have not.

Q. Did you ever see that article prior to coming to court today? A. No.

Q. Do you in the office of Matson Navigation Company regularly read and see the New York Journal of Commerce?

A. No, I do not personally.

Q. Do you know what the practice is with respect to the scanning or reading of any such journals as the New York Journal of Commerce or other newspapers or publications in the Matson Navigation Company?

A. The practice is on all journals that have come in, including this, to have someone in the executive department clip those items which seem to be important to the company, and then they are circulated among the officers and the various department heads.

Q. And who is the person who does that scanning and clipping? Is it an executive?

A. No, that is done by either one of the stenographers who are in that department.

(Testimony of Melvin Price.)

Q. Did you ever receive a clipping of this article we referred to in the New York Journal of Commerce for December 31, 1942? [97]

A. No, I did not.

Mr. Henry: That is all.

Cross-Examination

By Mr. Charles:

Q. Mr. Price, did you know anything about the fact that there was a War Damage Corporation prior to this particular claim being pressed?

A. Yes.

Q. Do you know what executives in your company see the Journal of Commerce, the New York Journal of Commerce?

A. I do not, no, other than the fact that clippings are circulated.

Q. And the Journal of Commerce has one of the principal shipping pages of the marine journals in the country? I expressed myself badly. Is it well known? A. It is well known.

Q. Do you know whether Mr. Roth, the President of your company, sees the Journal of Commerce? A. I do not.

Q. Do you know whether Mr. Walton sees it?

A. No.

Q. Or Mr. Gallagher, the Operating Manager?

A. I do not.

Q. Do you know whether Mr. Fraser Bailey, the former Executive Vice-President, sees it?

A. No, I do not. [98]

(Testimony of Melvin Price.)

Q. And you do not know what other men in the company may see it? A. No.

Mr. Charles: That is all.

Q. (By Mr. Henry): You do know, Mr. Price, there was no clipping referred to you and no reference was made to you of this article at any time until in court today, is that correct?

A. That is correct.

Mr. Henry: That is all.

Mr. Charles: If the Court please, the deposition of Mr. Goodale I think also is one which we may offer without the necessity of reading it. Your Honor mentioned the problem which has developed by the testimony and the objections. The testimony is of the type with which your Honor is familiar, and we can perhaps refer to the citations of authority which we believe support the testimony which we have sought from Mr. Goodale on direct examination in our briefs. I would, however, like to offer at this time a stipulation with a few corrections which refers to both Mr. Goodale's deposition and Mr. Knarr's deposition, both of which are minor corrections, which Mr. Henry and we have agreed upon. I will at this time offer the deposition in evidence with the understanding that the same objections may be deemed reserved.

Mr. Henry: May I make this suggestion with regard to [99] those corrections, your Honor: There is no disagreement at all on them, but at the same time, in the next day or so, if it is agreeable with

Mr. Charles, we could obtain the depositions from the Clerk and ourselves make those corrections so that your Honor won't have to check back and forth, and they will be on the face of the depositions. We did do the same sort of thing, as far as making corrections is concerned, on the New York depositions. I would like to make this suggestion: Mr. Goodale's deposition does involve a number of things that I think for the Court's understanding of the case, and also particularly with reference to the objections to certain of his testimony there, that if we could have a hasty reading of it, it would be helpful.

The Court: Why don't you state the substance of it or read such parts of it as you think are necessary?

Mr. Henry: I think that would be helpful.

The Court: What is the substance of the testimony? What is he testifying about?

Mr. Charles: He is testifying about the practice of the corporation, its interpretations of the statute with relation to the claims to be allowed, its interpretations of the statute with respect to the power of the corporation to make exceptions, the fact that it did, and also the claims that had been filed for the loss of ships, the three that Mr. Henry mentioned this morning, what disposition had been made of [100] those claims. That is the principal substance of it.

The Court: What you are really offering the deposition for is to show that the corporation, in

performing its administrative functions under this statute, made rulings and interpretations concerning this very matter or like matters?

Mr. Charles: That is correct.

The Court: Of course, we already know what the decision is in reference to this matter, because accompanying the Complaint is the letter of decision in which the corporation gives its reason for rejecting the claim in suit. Now, are there some other claims of a similar nature that were passed upon and an interpretation given?

Mr. Charles: There were only two. The other two were the Montebello, a Union Oil tanker, which, as explained this morning, was the subject of a suit in Judge Roche's court with a jury verdict in our favor, and the other case was, as the testimony shows, a fishing vessel which sailed out of a port on the Atlantic Coast and was lost at that time.

But we go further than this: we show in Mr. Goodale's testimony that the Corporation construed the statute to give it the authority to make exclusions as to the type of property covered, and that is the substance of his testimony. That is, if the Corporation did not have the power to make any exceptions, and the statute, as contended by our opponents, simply applied to all property, as they say, real and personal, [101] then the actions of the Corporation would not be in harmony with the statute. The Corporation took the position that it had the right to exclude the same types of property that were excluded in the press release and other

types, and that it had likewise the authority to exclude insurance claims, and we feel that that testimony should carry weight in the construction of the statute, because as the cases show, an agency of the Government which was instrumental in proposing the introduction of a statute in Congress, the interpretations of such agency should be given particular weight, and the interpretations referred to in Mr. Goodale's deposition cover not only the exclusion of ships, which has already been covered in the resolution and the regulations that we spoke of, but it refers to the practice pursuant to those regulations of excluding other types of property.

The Court: During the six months period? I am colloquially referring to it as the sixth months period.

Mr. Charles: Yes, I am referring to that. They excluded other types of property during that period, and we simply point out that if the Corporation did not have the power to exclude ships, they did not have the power to exclude anything, and their action in excluding all other types of property would not be proper. Or to put it the other way, the fact that they did exclude those things is a construction of the statute that they have the power to exclude them. [102]

The Court: That is really the question before the Court, isn't it?

Mr. Charles: That is correct.

The Court: Because Mr. Henry contends that during this six months period, because of reasons which he briefly touched upon and I suppose will

be argued in the briefs, that during the six months period there was some intent to take away or not to vest in the War Damage Corporation the power to make any exclusions during that period. Now, either they had that power or they did not. If they had the power, I suppose if it is determined they had the power to make the exclusions during the sixth months period, why, then, that would determine the matter.

Mr. Henry: With the further question that whether that power to exclude was subject——

The Court: Was seasonably and properly and not arbitrarily exercised.

Mr. Henry: That is correct, your Honor.

The Court: I will read this deposition, subject to any of the objections that have been made, but it seems to me that is the very question I have to determine. I mean I think I can take it as a fact, from what you said, that they did make exclusions for other property other than ships. I take it they did do that.

Mr. Charles: That is correct. [103]

The Court: The question is, did they have the power to do that. That I will have to determine irrespective of whether they did or did not do it.

Mr. Charles: Yes, the point is, with respect to this testimony, the Courts have held that in deciding the scope of the statute the Courts may be guided by the administrative determinations of the agency itself in construing the statute.

The Court: Only if it is reasonably within the scope of the power of the agency. In other words,

if the OPA decided that they were going to stop a man from delivering butter to an apartment house under rent regulations, I could say, "I am not going to pay any attention to that. That is not within the scope of their power." Isn't the main question whether they had the power to do what they did?

Mr. Charles: That is true, but the authorities——

The Court: I think I understand what your argument is, that the Court should give weight, where there have been certain powers and functions entrusted to an administrative agency to the interpretations of that agency of the manner and mode in which its powers should be exercised. There is no doubt about that. That has been commented upon in many authorities under many statutes. But the agency could not make a regulation that would give it the power to exercise a power under the statute if it did not have the power under the statute. [104]

Mr. Charles: I think the testimony is admissible on the very point as to whether the agency has the power. For example, your Honor may recall the case of *United States vs. The Truck Association*, which is in 310 *United States*. There again was involved the meaning of the term "employees" as used——

The Court: I read that. I think I read that case in connection with the newspaper cases I had a while back. You mean under the Social Security Act?

Mr. Charles: Under the Fair Labor Standards Act.

The Court: That is right.

Mr. Charles: You will remember the question there was the meaning of the word "employees." The contention was made that the term related only to employees dealing with the matter of safety, and the only jurisdiction of the ICC was over employees who had anything to do with the problem of safety.

The Court: I think that must be a different case then. As I remember the trucking case, it was a question of whether or not the trucking company itself was a service company. The trucks were furnished by individuals themselves, and the question was whether they were employees or whether there was employment, or whether they were independent contractors. I guess you must be referring to a different case.

Mr. Charles: That is a different case. I have excerpts [105] here.

Mr. Henry: I assume this will be covered by your brief.

The Court: I think, gentlemen, not to prolong this argument, it would be better to submit the deposition, I will read it, and to the extent to which I think, after I have read your brief and considered the matter, there is need to give weight to the decisions or interpretations of the War Damage Corporation, and to the extent that they are applicable, if they are applicable, I will either give them weight or not give them weight, depending upon what the whole picture requires, after you have briefed the whole case.

Mr. Charles: That would be fine.

The Court: I think that is the fair way to do.

Mr. Charles: I do not want to be understood as subscribing to the theory that all the questions and answers on cross-examination are pertinent. The scope of the cross-examination was somewhat enlarged.

The Court: I do not think there is much of a question of conflict here, gentlemen, as to any factual matters. It is pretty much a question of whether there is a cause of action under this statute or not.

Mr. Henry: I think that is correct.

The Court: I think I should consider anything that reasonably sheds light upon it, as long as it has some proximate relationship to the matter.

Mr. Henry: There are objections that we have raised throughout Mr. Goodale's deposition there, and primarily on his direct statement that he had studied the legislative history, and that having studied the legislative history he reached these conclusions; that we consider utterly contrary to the principle of law that that is something within the province of the Court.

The Court: Are you intending to present, either side, references to the Congressional Record in this matter?

Mr. Henry: Yes.

Mr. Charles: If the Court please, we would like a stipulation that the reports before both committees, or, rather, the records of the hearings before both committees, the reports of both the House and

the Senate and the Congressional Record may be referred to by either counsel or by the Court, and for convenience we will make the references which appear to be pertinent in our briefing, and then if we may leave with the Court the original record of all those documents, and while the Court, particularly under the recent decisions, has very wide latitude, I believe, in making reference to the legislative history or any part of it, I think it would clarify the matter if we covered it by stipulation.

Mr. Henry: I hesitate to enter into any stipulation that these committee hearings are admissible, in view of the fact that the bill as it finally came out of the House of Representatives [107] and was finally adopted was quite different from the bill that was originally proposed. I have no objection to stipulating—not stipulating, but acknowledging, I might say, the rule of law that the Court may refer to any proper legislative record on the question. But I do not want to be in a position, your Honor, of stipulating to something I do not consider has bearing on it.

The Court: To be frank about it, I do not think it makes much difference whether you stipulate to it or not. The Supreme Court has long since departed from the original rigid rule that the only statement that should be considered is the statement of the Chairman, the member of the Congress in charge of the bill when he made his report to the Congress. Now they refer to discussions on the floor of Congress and make a very liberal use of the Congressional Record.

I just recently decided a naturalization case in which somewhat the same question was raised as to the administrative interpretation of a statute. If you phone my secretary she will give you the name of the petitioner. It was a case in which the Commissioner of Immigration put his interpretation as to the meaning of one of the provisions of the statute providing for naturalization with respect to those who served in the armed forces during the war, and as a result of it I studied into the Congressional proceedings myself and appended them all to the opinion for the purpose of showing what the intent of Congress was in passing the statute. So I think whenever there is a claimed interpretation of a statute, particularly where the interpretation is entitled to weight because of the fact that it is by an administrative officer, the Court is free to examine into the Congressional proceedings themselves to see what the intent, if it can be found, in the record is with respect to the purpose of the legislation. I would have to dig that out myself, and as long as both of you have dug it out you might as well make my job easier by giving it to me.

Mr. Charles: The only difficulty about that, your Honor, is the hearing before the Senate Committee on Banking went on for a number of days and the record is quite large.

The Court: The committee made a report, didn't it?

Mr. Charles: It made a report, which is only two pages.

The Court: Aren't there any statements on the floor by the Chairman of the Committee?

Mr. Charles: Yes.

Mr. Henry: Yes, your Honor.

The Court: The report of the Committee and the statements by the Congressman in charge of the bill on the floor are the vital ones, because those are the statements on which the rest of the Congress acted in voting on the bill.

Mr. Henry: That is our position.

The Court: The Court has called attention to that in [109] several cases.

Mr. Charles: And of considerable importance are the matters that came up in the hearings when the particular amendments that are involved were decided upon.

The Court: Are there any statements made before the Congress either in the report of the committee or on the floor stating the reasons for the appearance of certain language or the non-appearance of other language in the bill?

Mr. Charles: If Mr. Henry and I once got started on that, your Honor would probably stop us, because we would both reach diametrically opposite conclusions somewhat vehemently. For that reason we believe it would be desirable to have all that record available.

The Court: Perhaps you are right. Suppose you let me have along with your briefs the whole business, and each side call attention to what you want to call attention to and I will have it all before me.

Mr. Charles: Although it is probably unnecessary, may I be considered as offering that in evidence at the present time? We will make the offer, just so there will be no question as to whether the record of legislative history is before the Court.

The Court: I never heard of that being offered in evidence.

Mr. Charles: We looked into the matter quite carefully [110] as a matter of excess caution in connection with the Montebello case, and we could not find any satisfying authority either that it had to go in evidence or did not have to. So we protected our record by making the offer.

The Court: You will have to be somewhat specific on that.

Mr. Charles: Yes.

The Court: I do not want to discourage you from putting in what you think is necessary for your record. I am going to consider it anyway, so it won't make any difference.

Mr. Charles: That is the reason I suggested a stipulation.

The Court: Don't you think that would protect you sufficiently, the statement of the Court upon this hearing that the Court will consider what either side wishes to call the Court's attention to in connection with the Congressional proceedings? I would think that that would be sufficient to protect you without encumbering the record. That is in effect a ruling by the Court, isn't it, that it will consider any matters in the Congressional Record,

the Congressional proceedings that either side wishes to call the Court's attention to in connection with the passage of this legislation?

Mr. Charles: I think that expression is sufficient, and we will then simply make it available at the time our briefs are filed. [111]

There is just one other thing to which I would like to call your attention. Regulations A has as a part of it the standard policy of the War Damage Corporation, and in view of the fact that it is in such small print I would like to offer separately this War Damage Corporation Form No. 1, Special Policy, which is a duplicate of that included in the Regulations A.

The Court: But in more readable type?

Mr. Charles: In more readable type.

The Court: Very well.

(The policy referred to was thereupon received in evidence and marked Defendants' Exhibit A.)

Mr. Henry: I objected to Regulations A, so I assume that it includes any part thereof.

The Court: I think you gentlemen probably can tie in most of these matters into your main points.

Mr. Henry: I cannot resist the temptation, your Honor, if I may, having been a little disappointed, that time did not permit us to read Mr. Goodale's deposition, just to make this observation, that Mr. Goodale is the General Counsel for the War Damage Corporation and in a sense, a very real sense there,

an advocate. Mr. Goodale in large part testified, as I mentioned, as to what he determined to be the meaning of the statute from his own study of the legislative history. Now, he concluded, according to his own statement, that marine [112] property "in transit" covered cargoes, and that cargoes were covered by insurance during this free period, and that that was the provision of the law, that they should be covered, but on their own determination they said, "We won't cover vessels." The point I am making there, your Honor, is that on the reasonableness of this exclusion we come down in the final analysis pretty much to a straight determination of whether vessels are property "in transit," because Mr. Goodale and the War Damage Corporation acknowledge that for those items that they consider property "in transit" they did cover, that the statute authorized the coverage, and they gave the coverage. It seems to me it comes back in that connection, when we are considering the interpretation of the statute, and so forth, and the legislative history, whether they were correct and whether they had the power to make that exclusion.

The point I am trying to make, your Honor, is that they have determined as far as marine property in marine transit, according to their definition of what marine property is, is covered; so it seems to me to spell out pretty clearly if vessels are properly to be considered property—and we submit that they are—we likewise should receive the same coverage that was acknowledged to apply under the statute to this free period for other marine property.

Mr. Charles: Of course, we disagree in every way on that. I think that ships were clearly outside the scope of the [113] statute, and the Corporation's understanding of the statute was that ships were not covered, but the term "property in transit," as the legislative history connected with the interpretation of that amendment, which was not in the original bill, shows, referred only to things carried and not ships, and we will make references to the committee hearings in which both Jesse Jones and Admiral Land appeared, the one in person and the other through a letter, and said, "We are not going to have our agencies occupying the same field. The Maritime Commission can do it. We are not going to do it." The Corporation then to make doubly clear its position, and in order to have a guide in handling claims, passed this October 2, 1944, resolution, in which they consolidated their prior practice, referred to Regulations A, and set down the various classes of property, which were numerous, that they would not cover. So in the light of the history of the Act itself and its background we see nothing illegal in the position taken by the Corporation and its powers to exclude property is quite evident, not only in the terms of the statute itself, but in the legislative history.

The Court: Before we fix the time for briefing in this matter, I would like to inquire whether this question of law was presented to the Court in the Montebello case. Was it?

Mr. Henry: We consider it was from this standpoint, your Honor; as far as their general right

to exclude vessels. [114] The question arose in the Montebello case whether the vessel was inside or outside the 3-mile limit. The "in transit" question was not involved.

The Court: In other words, if the Jury had decided the vessel was——

Mr. Henry: ——inside the 3-mile limit, the only basis the case could have gone to the jury on, the plaintiff would have been entitled to a recovery. In other words, the case got to the jury simply because there was some factual issue in dispute as to whether the vessel was lost inside the 3-mile limit.

The Court: The Jury decided the vessel was outside?

Mr. Henry: Outside the 3-mile limit.

The Court: Therefore clearly the statute did not apply.

Mr. Henry: That is right.

Mr. Charles: As I tried that case, perhaps——

The Court: If the Jury had decided it was in the 3-mile limit, wouldn't the Court still have to decide the question of law?

Mr. Henry: I think the Court decided that question by submitting it to the Jury.

The Court: What was submitted to the Jury? The whole case or some special issue?

Mr. Henry: If the Court had decided that this attempted exclusion by the War Damage Corporation of all vessels under [115] their order of October 2, 1944, which we call the retroactive order, if the Court had considered that that was controlling,

there was no occasion for submitting that case to the Jury. That would throw the case out completely. Whether the vessel was in or outside the 3-mile limit would not determine if that regulation was valid.

The Court: Did the Court consider all this legal argument?

Mr. Henry: There were lots of motions.

Mr. Charles: Inasmuch as I was counsel, if counsel will permit me, we made a motion raising the same issues on a motion for judgment for the defendant, and our opponents made a motion to strike our answers, which were similar, although as Mr. Henry said, the issue of property "in transit" was not involved, because the Montebello was going from San Luis Obispo to Vancouver, not between ports in the United States and possessions. Judge Roche took that under submission and we briefed the points quite fully, including the same issues we are reaching here, that there was no cause of action, and the Corporation had excluded the ships, and Judge Roche denied both our motion for judgment on the pleadings and also denied the motion to strike the answer. Then when the case got to the Jury Judge Roche said—and my only justification for mentioning this is that it is in the record—that he was disposed to grant the motion for the defendant and direct a [116] verdict, and although he said that at the time the jury trial had gone on for a considerable length of time, and we deemed it advisable not to make such a motion. The case was submitted to the jury, and the jury found, as Mr. Henry stated,

the ship was lost outside the three-mile limit, and therefore it could not be property situated in the United States, and having sued not only on the statute but on the press releases, because the press releases, having no application to property "in transit," nevertheless referred to property situated in the United States, and they claimed, both on that basis and on the basis of the statute, which likewise applied to property situated in the United States, and contended we did not have the authority to exclude from protection various types of property.

The Court: Did Judge Roche's statement have reference to the issue to be submitted to the jury, or the matter of previous motions?

Mr. Charles: With reference to the matter of the previous motions.

Mr. Henry: Those were both denied.

The Court: He had already denied them?

Mr. Charles: That is quite correct.

The Court: I do not quite get the reason for Judge Roche's statement that he was inclined to direct a verdict, if it referred to the issue that was being submitted to the jury. [117]

Mr. Ransom: Your Honor, maybe I can make a statement of that as an impartial observer—very impartial. The original motions that were made long before the trial Judge Roche denied; he denied our motion for judgment on the pleadings and also denied their motions to strike the answer. In effect, by doing that he decided nothing. At the end of the plaintiff's case Judge Roche asked whether we would like to

make a motion to direct a verdict. Mr. Charles made the statement that we would, but assumed he would reserve ruling. As the trial went on, and about two days before the end of the trial, Judge Roche stated in open court that he would be inclined to grant our motions for a directed verdict. We then decided not to make the motions, not to renew the motion at the end of the case, and in chambers—I do not know whether it is correct to say it was in chambers, but I think it is a fact—it was determined the morning that the matter was finally submitted to the jury that we would not have a motion for a directed verdict before Judge Roche, as he indicated clearly he would grant that motion——

Mr. Henry: I thought you said he was inclined to consider it. I do not get it.

Mr. Ransom: As it turned out, frankly, we won the case on the facts. We did not want the case considered on the law. We wanted a clear-cut verdict on the facts, which is what we got. We therefore did not at that time renew the motion [118] for a directed verdict. The court did not have to decide a motion for a directed verdict and did not decide the motion for a directed verdict.

The Court: That still does not clarify the matter in my mind. Do you mean that Judge Roche was going to direct a verdict by reversing his previous decision on the motions? If so, that is one thing, but if he was going to direct a verdict on a factual issue, that would be another thing. He could very well come to the conclusion that he should direct a verdict be-

cause of the inherent power to decide that the evidence is so preponderate one way or the other or undisputed that the court will, on a factual matter, direct a verdict. He may have had that in mind and there wasn't any question in his mind that the jury should decide and could not do anything else but decide that this ship was outside the three-mile limit.

Mr. Charles: Your Honor. I would really prefer not to comment any more on this, and I think, for the protection of our record, we might ask if the Court would disregard the comments we have made with respect to the other case.

The Court: What prompted my inquiry was that this is one court, and if some other judge has made a decision on the precise question that is before me, it would be travesty on justice to have Judge Roche decide one way and Judge Goodman decide another way on the very same question, and [119] we have always made it a practice of avoiding that. As a matter of fact, Judge Roche sat with me the other day in an admiralty case because of the fact that he had decided a case arising out of the same accident, and it would have been ridiculous for me to have held the respondent liable where the same act of negligence was alleged. Two people got injured at the same time and place as the result of the same act of negligence. Just because we have a multiple judge court does not mean that justice should founder itself that way. That is what prompted my question.

Mr. Charles: I have no question as to the propriety of your Honor's inquiry, but I have some question as to the propriety of my answer, because the matter was involved. While it is in the record, it is in statements which Judge Roche made, and we are clear in our own interpretation of them, but I am not clear enough with respect to the record but what Mr. Henry might draw some other inference from that.

Mr. Henry: My only contention in that regard, your Honor, is there is no decision in this court on either this factual issue or this issue of law, because the matter that was before Judge Roche was the simple question of whether it was lost inside the three-mile limit. Our vessel was lost far at sea.

The Court: Neither side is going to rely on the decision of Judge Roche?

Mr. Henry: That is correct. I do not think it has any [120] direct application to this case at all.

The Court: How did you want to brief this matter?

Mr. Henry: My suggestion would be that we have twenty days for opening, possibly twenty days for reply, and then ten days for a final brief from the plaintiff.

The Court: Is that satisfactory?

Mr. Charles: That is satisfactory.

Mr. Henry: There is only this question: I do not know whether Mr. Charles has an answer to that question I was asking you about the other day.

Mr. Charles: We might want to shorten it. We did get an answer. I am not sure of the substance

of it. Your Honor, that is with respect to the question of the period of the existence of the corporation. Mr. Henry was somewhat concerned lest the corporation completely expire by June before it would be possible for him to get a final decision from the Circuit Court of Appeals and from the Supreme Court within the limited time. We are endeavoring to find out for him what that situation is.

The Court: I suppose some other Government department will carry on, as in the case of all these other agencies. I do not think the Government ever escapes its obligations in that way, or attempts to.

Mr. Charles: We will make available to Mr. Henry all the information we have, and the only effect of it will be that [121] he might wish to cut down that time, and that we could do by stipulation.

Mr. Henry: Would it be agreeable, your Honor, that we get in touch with you or your clerk when the briefs are in and arrange for oral argument at a convenient time?

The Court: Of course, that time limit is not going to be binding on the court.

Mr. Henry: I understand that. I was just referring to the question of fixing the time for briefs and for oral argument.

The Court: The briefs will be filed 20, 20 and 10. I will mark it June 23rd for submission. If you want to shorten that period you can do so by agreement.

Mr. Henry: And then we could arrange for oral argument at a convenient time after the briefs are in.

The Court: Do you want to argue it besides?

Mr. Henry: Whatever your Honor's pleasure is.

Mr. Charles: I think it would be desirable. Your Honor might have questions.

The Court: Suppose you let that go until I have had a chance to study the case. There is no use of my hearing argument before I have read the briefs.

Mr. Henry: Thank you.

Mr. Charles: Thank you, your Honor. [122]

CERTIFICATE OF REPORTER

I, J. J. Sweeney, official reporter, certify that the foregoing 122 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ J. J. SWEENEY.

In the United States District Court in and for the
Northern District of California, Southern
Division

No. 24575-G

MATSON NAVIGATION COMPANY,
a Corporation,

Plaintiff,

vs.

WAR DAMAGE CORPORATION, a Corporation,
Defendant.

DEPOSITION OF HANS O. MATTHIESEN

Thursday, June 21, 1945

Be It Remembered, that on Thursday, the 21st day of June, 1945, at 11:15 o'clock a.m., pursuant to oral stipulation between counsel for the respective parties, at the office of Messrs. Hall, Henry & Oliver, 626 Matson Building, 215 Market Street, San Francisco, California, personally appeared before me, Ella Cook Kelly, a Notary Public in and for the City and County of San Francisco, State of California, Hans O. Matthiesen, a witness called on behalf of the plaintiff herein.

Messrs. Hall, Henry & Oliver, represented by Lyman Henry, Esquire, appeared as attorneys for the plaintiff; and Messrs. Lillick, Geary, Olson & Charles, represented by Allan E. Charles, Esquire, appeared as attorneys for the defendant.

(Deposition of Hans O. Matthiesen.)

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing [1*] but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the Notary Public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be recorded stenographically by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, and by stipulation between counsel for the respective parties the reading and signing of the deposition by the witness were waived.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Henry: Mr. Charles, this deposition can be taken in the usual manner, and the stipulations will be incorporated in the deposition?

Mr. Charles: Yes, fine.

Mr. Henry: And including a waiver of signing? Is that agreeable?

Mr. Charles: Yes.

*Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of Hans O. Matthiesen.)

Mr. Henry: And the Notary may be excused?

Mr. Charles: Yes.

HANS O. MATTHIESEN

a witness called on behalf of the plaintiff, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Henry:

Q. Captain, your name is Hans O. Matthiesen, and you are at the present time a commander in the United States Naval Reserve, is that correct?

A. That is correct, yes.

Q. In December of 1941, you were the master of the American steamer "Lahaina," official number 220763? Is that correct?

A. That is correct.

Q. And the vessel at that time was owned by the Matson Navigation Company?

A. She was.

Q. And you were employed as master by the Matson Navigation Company?

A. That is right.

Q. Do you recall the tonnage, gross tonnage, registered tonnage of the "Lahaina," Captain?

A. 5645 tons.

Q. Gross registered tonnage?

A. Gross, yes.

Q. And the net tonnage? A. 3517.

(Deposition of Hans O. Matthiesen.)

Q. And when was the "Lahaina" built?

A. In 1920.

Q. What was the last voyage, or rather what was the last port of departure of the "Lahaina" in December of 1941? [3]

A. Ahukini, Kauai, Territory of Hawaii.

Q. And on what date in December did the "Lahaina" depart from Ahukini?

A. December 4th, 1941.

Q. And where was the "Ahukini" bound for at that time?

A. Where was the "Lahaina" bound for?

Q. Yes, the "Lahaina"?

A. Bound for San Francisco.

Q. Did she have any cargo aboard?

A. Yes, she had about a thousand tons of cargo aboard.

Q. And what was the character of the cargo generally?

A. Mostly scrap iron and—scrap iron and, I believe, a few items of general freight, the nature of which I really have forgotten.

Q. Was all of that cargo from Hawaiian ports?

A. It was all loaded in Hawaiian ports, yes.

Q. And had the "Lahaina" been voyaging between Hawaiian ports and the Mainland at all times within recent months prior to this voyage?

A. Prior to that voyage, yes, as long as I had been on her.

Q. Yes. And where is the "Lahaina" today, if you know, Captain?

(Deposition of Hans O. Matthiesen.)

A. I know. She's sunk by a Jap—a Japanese submarine, rather.

Q. And what was the first occasion that you learned of the attack on Pearl Harbor and the state of war between the Empire of Japan and the United States?

A. The first indication we had of that was when we heard on our radio sets that Pearl Harbor had been attacked on the [4] morning of December 7th.

Q. 1941? A. 1941.

Q. And at that time you were on this voyage from Ahukini to San Francisco?

A. Yes, sir, I was.

Q. Just tell us in your own words if you can, Captain, what occurred with respect to your first learning of any enemy submarine that attacked you, or any enemy action which resulted in the sinking of the "Lahaina"—just in narrative fashion, if you can throw your mind back to those events, Captain.

A. In connection with the sinking of the "Lahaina" only, you mean?

Q. Yes.

A. I see. All right. At about 1:40 p.m. on December 11th, I was on the bridge with the second officer, when a shot was fired over the "Lahaina," which we discovered when the shell struck the water ahead of the ship, and immediately after we saw the splash of the shell we heard the report of the shell exploding, and immediately after that

(Deposition of Hans O. Matthiesen.)

the explosion of the powder charge from the submarine, so we turned around in the direction where that sound came from and there was the submarine lying broadside to in the sun.

Q. It was clear and broad daylight?

A. Clear and broad daylight, beautiful weather, a northeasterly wind blowing about force 4, and the submarine was stopped and——

Q. On the surface?

A. On the surface, yes. So naturally we took that as a warning shot for the vessel to stop [5] in order to be searched under international law, which we did.

Q. You stopped?

A. We stopped the engine and hove to.

Q. And then what happened, Captain?

A. And of course the Japanese kept firing. The second shot came close aboard, and the third shot hit in the machine shop on the starboard side amidships about, oh, I should say ten feet above the water line, and the shrapnel off the shell pierced the bottom of the starboard lifeboat, which was swung out over the side for just such an emergency. There being a state of war, naturally we took that precaution.

Q. Were any of you, or any of the officers or crew, in the lifeboat at the time that these other subsequent shells that you have referred to started striking the "Lahaina"?

A. No, after the third shell struck, then I ordered to abandon ship, because, in my opinion, the

(Deposition of Hans O. Matthiesen.)

Japanese submarine had the intention of keeping on shelling it, you see.

Q. Now, about what was the location of the "Lahaina" at the time that you sighted the submarine, when she fired on you as you have mentioned?

A. The position in latitude and longitude, you mean?

Q. Yes, approximately.

A. Yes. All right. The latitude twenty-seven thirty-five north, and one hundred and forty-seven twenty-five west.

Q. Longitude? A. Longitude.

Q. And was the vessel bound for San Francisco at that time? [6] A. Yes, sir, she was.

Q. Was she on her regular or, you might say peacetime course for San Francisco at that time?

A. No, I wouldn't say that she was on her peacetime course.

Q. What was the difference, if any, from her ordinary peacetime course? Was she north or south of her peacetime course?

A. Well, we had received orders to—on two occasions previous to the sinking, to change course, so naturally she was not on the great circle track from Ahukini to San Francisco.

Q. And the course that she was on at the time that the submarine attacked was to the north or south of the great circle?

A. It was to the south of the great circle track.

(Deposition of Hans O. Matthiesen.)

Q. To take her out of the more frequented or normally frequented track of vessels?

A. That is right, yes.

Q. But she was still bound for San Francisco at that time?

A. Bound for San Francisco, yes.

Q. About how far off the "Lahaina" was the submarine at the time these first shots were fired?

A. About 1500 yards.

Q. Did the position of the submarine change any after that with respect to the "Lahaina"?

A. Oh, yes, after the "Lahaina" was stopped and they had been shelling the "Lahaina's" starboard side, and after we abandoned ship, the submarine crossed the—in other words, went ahead across the bow of the [7] "Lahaina," and then bore down on the "Lahaina" on a parallel line of approach, and as the submarine got close to the "Lahaina" she put her stern up to the midships section about 150 yards off, and from that position shelled the engine room, firing about five or six shots, putting a large hole into the engine room itself so that the engine room filled full of water, you see.

Q. And where were you at that time?

A. At that time I was in the lifeboat on the port side of the "Lahaina" and about a hundred yards from the Japanese submarine.

Q. Did you have any means of identifying the nationality, or verifying rather the assumption that you had made that it was a Japanese submarine?

(Deposition of Hans O. Matthiesen.)

A. Oh, yes, we could tell by the stature of the men on deck and also by the commands that were given at the time.

Q. Have you ever been—had you before the sinking ever been to Japan?

A. Oh, yes, on quite a few occasions—I should say about ten or twelve times.

Q. And could you recognize the speech as being that of Japanese nationality?

A. Oh, yes, yes.

Q. That is, the commands and speech that you heard from the men on the surface—on the deck, rather, of the submarine?

A. Of the submarine, yes.

Q. That was when you were only about a hundred yards off, after you were in the lifeboat?

A. Yes. [8]

Q. Now, did all hands on the “Lahaina” get away in the lifeboat?

A. Yes, sir, all of them got in the boat.

Q. And you were in a single lifeboat?

A. In one lifeboat, yes; quite crowded, by the way.

Q. Now, about how many shots from the submarine in all were fired toward the “Lahaina”?

A. I should say twenty-five shots.

Q. And about how many of those shots took effect in the sense of hitting the “Lahaina”?

A. Twelve.

Q. And you judged that from what, captain?

(Deposition of Hans O. Matthiesen.)

A. From the holes that we counted after we were in the lifeboat.

Q. Now, after you were in the lifeboat did you go back aboard the "Lahaina"?

A. We did, yes, the next morning.

Q. That would be on the morning of December 12th?

A. That is right, yes.

Q. When did the submarine leave the scene, approximately?

A. Oh, he left—he left about half an hour later—well, let's see I should say he left about 2:30.

Q. So that there was less than an hour from the time that the submarine first fired until the submarine disappeared from the scene?

A. That is right, yes.

Q. And did the submarine disappear on the surface, or did she submerge?

A. No, she disappeared on the surface, steaming away in a northeasterly direction.

Q. Now, when you went back aboard the "Lahaina" on the [9] morning of December 12th, did you make a survey of the damage to the vessel to determine whether there was any possibility of salvaging her?

A. Oh, yes, we did. We went down to the engine room, and there we saw that the starboard boiler had been pierced and the engine appeared to be damaged—the engine itself; and besides, the engine room was full of water, you see, and all through the night the settler tanks had been burning—in fact,

(Deposition of Hans O. Matthiesen.)

burning so intensely that it lit up the whole sky, you know.

Q. During the night—that is, the night of December 11th and the early morning during the darkness hours of December 12th—was the “Lahaina” afire as you mentioned?

A. Afire from stem to stern, except—everything from the forecastle head, all the holds were burning, the wood, the sweat battens and the ceilings in between the decks were burning, the officers’ house and the bridge and No. 4 hold, No. 5 and the crew’s quarters; then of course forward under the fore-castle head the paint locker was burning fiercely.

Q. And about how far from the “Lahaina” was the lifeboat while you stayed off watching her burn there?

A. From one to two miles, I should say. We sailed at first, while there was wind, up and down, and with the “Lahaina” drifting toward the west we kept on following her until the wind died, and then of course we had to row to follow her.

Q. Did you see the “Lahaina” go down?

A. Yes, sir.

Q. And when did she sink then, approximately?

A. Approximately 11:30 on December 12th.

Q. 11:30? A. A.M.

Q. A.M.? A. A.M., yes.

Q. And about how far off of her were you and the other men in the lifeboat at the time she actually went down?

(Deposition of Hans O. Matthiesen.)

A. When she went down, I should say 750 yards.

Q. Then except for the effect of wind and current on the "Lahaina" from the time she was first attacked by the submarine until she sank, she was in the same location as you mentioned?

A. Yes, that is correct, yes.

Q. And of course the exact amount that she had drifted during that time, or changed her position, you could only roughly estimate? Is that correct?

A. Yes. Well, you could determine that within a few miles, of course—not too precise at any time.

Q. Yes, but it would be just the effect of wind and current that would have changed her position?

A. Yes, that is right.

Q. I don't know whether I understood you correctly on it, whether the "Lahaina" sank at 11:30 or 12:30. I have a note here of 12:30, Captain, p.m., and I don't know whether that is correct or not.

A. It might have been 12:30—it might have been 12:30.

Q. Yes. A. That, of course, is true.

Q. If you made a memorandum——

A. If we made a [11] memorandum of that at the time after we returned, then I am inclined to think that that is more correct.

Q. Yes. A. Sure.

Q. But it might have been at 12:30 p.m. on December 12th? A. That is right.

Q. Instead of 11:30 a.m. on December 12th, 1941? A. That is correct, yes.

(Deposition of Hans O. Matthiesen.)

Q. Now was any one of the officers or crew injured as a result of the submarine attack on the "Lahaina"? Did any of them suffer any personal injuries as a result of the attack on the "Lahaina"?

A. Not directly, no, if you mean were they wounded.

Q. That is what I mean.

A. From the shell fire?

Q. Yes. A. No.

Q. I will put it this way, Captain: When they got in the lifeboat they had suffered no injury?

A. No injury by shell shrapnel or by shell fragments, or anything like that, no.

Q. And none of them had injured themselves in leaving? A. In leaving the vessel, no.

Q. And then after the "Lahaina" sank, what became of the lifeboat that you fellows were in?

A. Well after the "Lahaina" went down, of course we were becalmed for a while, and two days we had to row, and then we got westerly wind—in other words, wind from the direction toward which we wanted to go—so we hoisted sail and stood south—— [12]

Q. That would be an easterly wind, then, wouldn't it, Captain?

A. No, a westerly wind. We wanted to go to Hawaii, so it was a westerly wind that we had.

Q. It was a wind blowing from——

A. From the west.

Q. All right.

(Deposition of Hans O. Matthiesen.)

A. And that is the direction in which we wanted to go, you see, so we had a head wind directly against us, you know.

Q. Yes.

A. So we had to sail south in order to get into the strong trade winds, which of course we would have; and that lasted two days, and then in about latitude twenty-five we struck the northeasterly trades and easterly trades, and from them on of course we really traveled; we sailed for all she was worth, you know, night and day, before it. We had a strong northeast and easterly wind; in fact, toward the last, as we got to the Hawaiian Islands, it got so strong that we had to take and reef our sail. In other words, the little sail we had, we had to lower down and only hoist it up halfway, and still made more time than we did previously with the entire sail.

Q. And did the lifeboat reach land in the Hawaiian Islands?

A. Yes, we landed on the 21st of December at Sprecklesville on Maui.

Q. And did any of the men lose their lives in the course of this trip?

A. Yes.

Q. In the lifeboat?

Mr. Charles: I object to the question on the ground that the complaint does not seek recovery for loss of life or [13] loss of personal effects of any of the crew members, but only seeks recovery for loss of the ship, I believe.

Mr. Henry: That is true, Mr. Charles. I am simply trying to get a little bit of the incidental

(Deposition of Hans O. Matthiesen.)

narrative here as to what the experiences were afterwards, and if there was no further enemy action that they experienced while they were in the lifeboat.

Mr. Charles: I don't think that such evidence has any bearing on the issues of the complaint.

Q. (By Mr. Henry): Well, I will ask that you answer the question, Captain, whether any of the men in the lifeboat lost their lives while you were in the lifeboat and before you reached shore?

A. Yes, we lost four men.

Q. And how many men were there in the lifeboat at the start? A. Thirty-four men.

Q. And that was the full complement of the vessel? A. The full complement, yes.

Q. And do you remember the names of the men who had lost their lives or failed to reach shore?

Mr. Charles: I make the same objection.

Mr. Henry: Yes, and I understand it extends clear through this line of questioning here, Mr. Charles.

A. Yes. Del Tinto, oiler.

Q. Is that Concezio Del Tinto?

A. Yes. And then we have Moore, second cook.

Q. Hilliard Moore?

A. Hilliard—that is right—second cook. And then we have Lundquist, able seaman.

Q. That is Albert Lundquist?

A. Albert, yes, that is correct. Let's see, now, what did we have? Did we mention Freedman?

(Deposition of Hans O. Matthiesen.)

Q. Freedman you didn't mention.

A. No. He was an able seaman too.

Q. Herman Freedman?

A. Herman Freedman, yes.

Q. And with the exception of those four that you have mentioned, all of you landed?

A. All of us landed, yes.

Q. As survivors? A. Yes.

Q. When you said it was December 12th the vessel sank, that was December 12th, 1941?

A. 1941.

Q. The day following the original attack?

A. Yes, sir, that's right.

Mr. Henry: That is all.

Cross-Examination

By Mr. Charles:

Q. Captain, very roughly about how many miles from the Hawaiian Islands were you at the time of the submarine attack?

A. On a direct line?

Q. Yes. A. To the nearest point?

Q. Yes.

A. Oh, I should say—I'm estimating now—650 to 700 miles.

Q. And do you recall approximately what the heading of your [15] ship was at the time of the attack?

A. The heading of the ship at the time of the attack—well, I will have to generalize.

Q. That is all right.

(Deposition of Hans O. Matthiesen.)

A. I don't even remember the exact course.

Q. That is sufficient.

A. But the heading must have been around seventy degrees true.

Q. Were you able to save your log books?

A. No, sir.

Q. Did you save any records at all, Captain—any of your ship's records? A. No, sir.

Q. Did you have your own diary?

A. Yes.

Q. Of the events?

A. I made up a ship's diary; that is, a diary for the lifeboat.

Q. I see. And in that diary did you include any statement as to the location of the ship where she was sunk? A. I did, yes.

Q. Did you include also her course?

A. Not her course—yes, I did, insofar as it is stated that she was on a voyage from Ahukini to San Francisco.

Q. Yes. And do you have that record with you, Captain, at this time?

A. I haven't it with me, no, but it could be produced.

Q. Is it in your own possession or in the company's possession?

A. It is in my possession, yes.

Q. And prior to the time that your ship was attacked did you receive any Navy orders as to the destination of your ship? [16]

A. Yes, twice.

(Deposition of Hans O. Matthiesen.)

Q. And what was the contents of those orders?

A. The first time was a dispatch in code from the 14th Naval District, the commandant of the 14th Naval District, directing all United States ships to proceed to the nearest United States or friendly port, and of course at that time that is the order I carried out.

Q. That is, you carried it out after your ship was sunk, in coming back to the Islands, you mean?

A. No, no, I was on the way from Ahukini to San Francisco. On about the 8th of December I received this message from the 14th Naval District, I believe, directing me, as I said, to proceed to the nearest friendly or United States port.

Q. And you interpreted that to mean San Francisco, rather than return to the Islands?

A. No, I interpreted that to mean Honolulu or the nearest Hawaiian port.

Q. Oh, I see.

A. So I proceeded to Honolulu.

Q. That is, your ship was actually headed to Honolulu at the time of the attack?

A. No, sir, it was not. As I mentioned previously, I had received two orders.

Q. Will you go ahead and tell me about the other order?

A. All right. So the next day I received a dispatch from the commandant of this naval district here on the west coast, San Francisco, which was the 12th.

Q. Yes.

(Deposition of Hans O. Matthiesen.)

A. And, by the way, the Hawaiian area is the 14th. I made a mistake—— [17]

Mr. Henry: You mentioned the 14th.

A. Oh, did I mention the 14th?

Mr. Henry: Yes.

A. Fine—O. K. So then I received an order from the 12th Naval District, the commandant of the 12th Naval District, to proceed at the utmost speed to San Francisco, toward Point Conception. I was mentioned in the dispatch at that time; I was mentioned definitely—addressed to the “Lahaina” and three more ships, which I have forgotten. One of them was the “Liola,” I believe. So upon receipt of that order I turned around again, of course and headed toward Point Conception as ordered.

Q. (By Mr. Charles): On what date did you say that order was received—the second one?

A. That order was received I believe on the 9th—the morning of the 9th.

Q. And then did you receive any further orders, Captain?

A. After that I received no orders, no.

Q. And you kept on your course towards San Francisco?

A. I kept on my course towards San Francisco, yes.

Q. Toward Point Conception?

A. Toward Point Conception, yes.

Q. And you don't remember just what the wording of that order was, do you? A. Yes.

Q. Did it say “Go to Point Conception”?

(Deposition of Hans O. Matthiesen.)

A. I believe—I remember the order very well. It read—not very well; I should not say very well, but I will do my [18] best. It read: “From Commandant 12th Naval District to SS ‘Lahaina,’ ‘Liola,’” and two other ships which I have forgotten—the name of which I have forgotten——

Q. Yes.

A. “Proceed at utmost speed to San Francisco on a course toward Point Conception.” Signed, “Commandant, 12.” It was a very short message, I remember.

Q. And you acted on that and continued toward——

A. Oh, yes, yes.

Q. (Continuing): ——toward Point Conception from then until the time of the attack? Is that right?

A. Yes, sir.

Q. And if I get the whole statement that you made correct, you first of all got the message from the 14th Naval District at Honolulu?

A. Yes.

Q. Which directed you to return to Honolulu?

A. Yes.

Q. And you then turned your ship around and started back toward Honolulu? Is that correct?

(The witness nods his head affirmatively.)

Mr. Henry: Just say “Yes” so the reporter can hear you.

A. Yes, sir. Excuse me.

(Deposition of Hans O. Matthiesen.)

Q. And about how long were you headed toward Honolulu before you got that second message on the 8th of December? A. How long?

Q. Just approximately.

A. All right. Approximately eighteen hours from—yes, approximately eighteen hours, that is correct.

Q. And then when you got this next order you swung your [19] ship around? A. Yes.

Q. And started back immediately toward San Francisco?

A. Yes—that is, headed back toward Point Conception.

Q. And did your radio continue in operation all the time until the submarine attack?

A. Oh, yes. In fact, we were in operation up to the time—we sent out an S.O.S., which was intercepted, by the way, by radio at Honolulu, and of course after that we didn't send any more, but we were in operation with our radio, not at all times but during the times that the operator was to be on watch. Being a one operator ship, he had certain watches to stand, and of course those watches he stood, and the watches he stood were known, of course, to the Navy Department.

Q. Yes. Did you hear afterwards, by any chance, whether any further messages had been directed towards your ship which you didn't pick up?

A. No, sir, I hadn't—

Q. As far as you know, there were none?

A. No, not as far as I know.

(Deposition of Hans O. Matthiesen.)

Q. On that voyage on which your ship was lost, Captain, was your crew under articles?

A. Under coastwise articles.

Q. Under coastwise articles? A. Yes.

Q. And do those articles state the ports of call in them? A. Oh, yes.

Q. And did they say "voyage from Honolulu to the United States and return," or how were they worded, do you know? [20]

A. No, we enumerated all the Hawaiian Islands, you see—"on a voyage from San Francisco to the Hawaiian Islands"—I don't really remember how the exact wording was. I would have to refresh my memory first on that, you know.

Q. Yes. Do you remember whether there were any ports mentioned there other than ports in the Hawaiian Islands and San Francisco?

A. No, there were no other ports mentioned in that at all.

Q. And was the ship at any time destined to go to any other port—any other ports other than the Islands and San Francisco? A. No, no.

Q. And then you never received any messages or directions from the company or anyone else to proceed other than to San Francisco?

A. No, sir.

Q. And Point Conception? A. No.

Q. You mentioned that your ship had about 1000 tons of scrap iron, I think you said, on board?

A. Yes.

(Deposition of Hans O. Matthiesen.)

Q. Was that carried under bills of lading, do you recall?

A. Yes, it was; it was cargo, definitely.

Q. Those were Matson Line bills of lading, I assume? A. Yes.

Q. And do you remember what the port of destination of the scrap iron was?

A. San Francisco.

Q. Was your ship under charter at the time, Captain? A. Under charter, no, sir.

Q. The ship was owned by Matson?

A. Owned by the Matson [21] Navigation Company, yes, and running for the Matson Navigation Company.

Q. And it had not been requisitioned prior to the time of its loss? A. No, sir.

Q. Let's see—did I understand you to say that you did go back on the ship after she had been shelled by the Japanese?

A. That's correct, yes.

Q. And how long were you on the ship approximately?

A. Approximately forty-five minutes, I should judge.

Q. Did you alone go back? A. No.

Q. Or did some of the men go with you?

A. Now, let me see—the third assistant engineer, the first assistant engineer, the second officer, myself and two or three others that I don't really remember, whose names I can't recall. I am under the impression there were about six or seven men that went back on the ship.

(Deposition of Hans O. Matthiesen.)

Q. At the time you went back on, Captain, was she low in the water at that time?

A. Yes, she carried a tremendous list to port—wait a minute—is it port or starboard—no, it is starboard, that is right.

Q. But her decks were not awash at that time, were they? A. No.

Q. Was there any fire on the ship at that time?

A. The fire was still burning, yes, in between decks and in the starboard—that is, in the midship house around the engine room fiddley—that is, around the stack casing—the [22] stack casing and in that fiddley, in that particular location; and the fire was eating from there into the midship house on the starboard side. In fact, while we were on the ship a coil of rope that was used to lower the starboard lifeboat was catching afire; it was burning at the time.

Q. And did you make any effort at that time to stop the fire?

A. No, it was impossible to have a good footing on the ship, and it was taking——

Q. More of a list?

A. More and more of a list, yes, it was increasing all the time, you see, and of course, the engine room being full of water, there was no chance of getting power on the pumps, and of course with buckets—well, there were none, you know, at the time; and, in fact, after we looked at the engine room then we figured, “Well, there isn’t much hope.”

(Deposition of Hans O. Matthiesen.)

Q. How high was the water in the engine room?

A. Right up—right up to the fiddley, you know.

Q. It was up over the fires?

A. Oh, it was definitely over the fires. The entire engine room was under water. The engine itself and the boilers were submerged, you see.

Q. Did the boilers explode?

A. No, no. The starboard boiler received a hit, and of course the steam escaped; and the port boiler did not explode, and I couldn't determine whether it had been damaged. In fact—that is, I don't know whether it had been damaged or not, but the engine was, though— [23] the engine itself, you see, received a hit, so that put the engine out of commission.

Q. And did the other men stay on as long as you did—forty-five minutes or so?

A. Approximately so, yes.

Q. And did you open any sea cocks or take any other steps of that kind?

A. No, no. You see, we couldn't get down into the bottom of the engine room, you know, being full of water, you see; that was out of the question.

Q. And did the fire continue, do you know, Captain, until the ship sank?

A. She was smoking up until the ship went down. Not much smoke, that is true, but she was smoking, and the upper structure in the midship house was smoking up to the last.

(Deposition of Hans O. Matthiesen.)

Q. Did you have any pump on the ship that worked by a donkey boiler or any auxiliary apparatus? A. No, sir.

Q. Did you submit a report, Captain, to the U. S. Coast Guard, the Bureau of Marine Inspection and Navigation, regarding the loss?

A. I certainly did at the time; that is, in Honolulu I made that report.

Q. I see. And when you got back to San Francisco did you make any entry in the Customs House as to the place of loss and time of loss of your ship?

A. That was done in Honolulu.

Q. In Honolulu? A. In Honolulu, yes.

Q. Was Honolulu the home port of the ship?

A. No, sir, it was not, but I believe the law reads that you are to make known the loss of any ship at the first port at [24] which the commanding officer or the master arrives, and that was done in due form.

Q. Did you make any reports, other reports of the loss, Captain—Written reports, that is?

A. Written reports—let's see—what written reports did we make? We made it to the United States inspectors. I made out a report; I wrote a statement. That is the statement there (indicating).

Mr. Charles: Referring to a statement that counsel has.

A. Yes, and that is about all the reports I made.

Mr. Charles: I think that is all.

(Deposition of Hans O. Matthiesen.)

Redirect Examination:

By Mr. Henry:

Q. I think I neglected to ask you, Captain, whether the "Lahaina" had any armament or defense guns of any kind at the time?

A. No, sir, none whatever.

Q. I was just looking at this statement that you made reference to there about the written reports.

A. Yes.

Mr. Henry: I have, Mr. Charles, a phostatic copy of statement signed by H. O. Matthiesen on February 20th, 1942 (handing phostat to Mr. Charles).

Q. I note there it refers to December 7th several times, the day of Pearl Harbor, in the afternoon, that you received your first mesage. Is that correct? I was a little confused on the dates there, Captain—whether you said December 8th or [25] December 7th.

A. If I made that statement in this particular piece of paper, then I am inclined to think that this December 7th is correct.

Q. So that if you received your first instruction or order——

A. On December 7th, then I received the second order on December 8th.

Q. I see. 1941? A. Yes.

Mr. Henry: That is all.

(Deposition of Hans O. Matthiesen.)

Recross-Examination

By Mr. Charles:

Q. Captain, had you received any naval instructions, or instructions from any other source, with respect to what you were to do in the event that you were accosted by an enemy craft?

A. Did we receive any instructions by radio, do you mean, Mr. Charles?

Q. Well, I meant generally, whether by written instructions or radio or oral, by word of mouth.

A. Let's see, now—we had no instructions of that nature to my knowledge, no. I had instructions that in case of imminent capture, to destroy any codes that were on the ship—any secret codes of any nature whatever, to destroy them, which I did at the time; but I had no instructions as to the procedure to follow if capture by the enemy were imminent in case of war. At that time we had not received any such thing yet. You see, it was before the [26] war when I left Ahukini, and war broke out while the ship was on the voyage from that point to San Francisco, you see.

Q. The only things you had were just the codes?

A. The codes, that is all.

Q. Now at the time you swung your ship there, or hove to, had you been able to identify the submarine, as to whether she was a Japanese?

A. Not at that time, no. We didn't know whether she was Japanese or not. We knew that she was firing at us—that being enough for us to stop the

(Deposition of Hans O. Matthiesen.)

ship, you see. A warning shot across the bow, in any man's language means "Stop your ship."

Q. And did you assume that the submarine perhaps was a United States submarine?

A. No, sir, I didn't assume any such thing. I didn't know for a moment just what it was, but it was best to stop. That idea I had in mind. Naturally, when a man of war fires on a merchant ship a warning shot across the bow, that can only mean that one thing, to stop; and whether she is Japanese or American or any other nationality, that is what it means, in my estimation.

Q. You felt that that was the best thing to do?

A. I think so, yes.

Q. For the safety of your men?

A. For the safety of the men and the ship as well, until the nature of his intentions was established, you see. Of course, there was no doubt in my mind at the time that he was a Japanese, because who else would fire on us? Our own submarines certainly would [27] not fire on us; that is a certainty. I should not say that I knew he was a Japanese; I knew that he was an enemy, you see.

Q. Yes. You were flying the American flag?

A. Oh, yes, sure.

Q. And it was clear so that he could see?

A. It was clear—oh, beautiful daylight and beautiful weather; but whether he was Japanese or German, that of course I didn't know.

Q. Was there any signal— A. No.

(Deposition of Hans O. Matthiesen.)

Q. He didn't signal to you before he shot?

A. No, sir, no signal whatever.

Q. No flag signal? A. No, sir.

Q. No whistle signal?

A. No, nothing. He just appeared on the surface and opened up.

Q. Well, in the international code there are provisions for the signaling of a vessel?

A. Oh, yes. A letter "K," for instance, "Stop your vessel immediately or I shall fire upon you." You see, that letter indicates right then and there that if you don't stop, the man of war will fire.

Q. And that is on a flag that is hoisted?

A. That is hoisted in the air.

Q. By the accosting craft?

A. Yes, that is right.

Q. And did you see any such flag on the submarine? A. No, sir.

Q. Do you remember whether you directed the S.O.S. to be sent before you hove to, or afterwards?

A. Yes, sir, we were all ready for that. We had a regular system that we had the positions laid out in half hour intervals all through the day and all through the night, and all the radio operator had to do—that is, when he broadcast the S.O.S. and the ship's position, he looked at his own time, the ship's time and the position on the chart, you see, at that same time, and that is the way we would work it up for the watch ahead all the time, you know. Every time the officer on watch leaves the bridge, that is

(Deposition of Hans O. Matthiesen.)

the first thing he would do; he would give the radio operator the positions of the ship for the next four hours ahead, under my supervision. The minute the war broke out, that is the procedure which we instituted, you see.

Q. I see. And did the S.O.S. message say anything about the enemy attacking, do you know?

A. Let's see, now—I believe it did, yes.

Q. I suppose, Captain, the engines were shut down prior to the time when you abandoned ship?

A. Yes.

Q. Did you give any directions to the——

A. I stopped the ship, yes.

Q. You stopped the ship? A. Yes.

Q. Did you give any directions to the engineers to secure the fires, or any other directions?

A. No. I gave orders, when he kept on shelling, to abandon ship. I didn't tell the engineers to secure anything down below, because they were [29] forced to leave the engine room because the starboard boiler was pierced by a shell hit. You couldn't very well shut anything down; in fact, the——

Q. Did the engines operate at all on the other boiler, do you know?

A. Could the engine be operated on one boiler?

Q. Yes.

A. Oh, yes, it could be under normal conditions, certainly, oh, yes.

(Deposition of Hans O. Matthiesen.)

Q. Did the shell—was the shell that pierced the boiler received after you turned around and hove to, or before, do you recall?

A. It was before.

Q. It was before? A. Yes.

Q. Was that the first shell?

A. That was the third shell.

Q. The third shell?

A. Yes. And it went through—no, wait a minute—no. The fourth, I believe it was—well, the fourth—let's say the fourth—oh, the fourth or fifth shell. Now, I don't really recall. The first hit, of course, was in the machine shop, and what damage she did outside of the machine shop I don't know.

Q. Was the ship out of operation before you turned around and hove to, Captain, do you recall?

A. Out of operation, no, sir—no.

Q. Were the engines in good operating condition prior to the time of the attack?

A. Prior to the time of the attack, yes, in good condition, yes.

Q. Did you have on board any instructions such as those [30] later issued, which gave you any directions as to zig-zagging or any other operations to endeavor to avoid attack?

A. None whatever, no.

Mr. Charles: I think that is all.

Mr. Henry: I think, Mr. Charles, I will ask that this photostatic copy of this statement be marked as "Plaintiff's Exhibit 1 for identification." I could

(Deposition of Hans O. Matthiesen.)

probably get the original. This is a photostat. Would you have any objection to the photostat being used as though it were the original?

Mr. Charles: Where is the original?

Mr. Henry: I don't know. It may be in the office of the company.

Mr. Charles: I don't think—I think this would be—this is the original of that report?

The Witness: The original?

Mr. Henry: It is a photostatic copy.

Mr. Charles: A photostatic copy of the statement that you signed?

A. Yes, sir, that is my signature on there (indicating).

Mr. Charles: All right. That is all right.

(Said photostat marked "Plaintiff's Exhibit No. 1 for identification.")

Redirect Examination

By Mr. Henry:

Q. Captain, how much time, if you can make an estimate of it, expired from the time that the first shell of the enemy submarine was shot across your bow and the subsequent shooting by the submarine—that is, the next shot that was fired by the submarine?

A. Well, it went pretty fast.

Q. Well, could you make an estimate of the minutes—some rough estimate?

(Deposition of Hans O. Matthiesen.)

A. Oh, I should say one shot a minute for the first series of about twelve or fifteen shots, I should say.

Q. But what I am getting at is, from the time that this first shot was fired across your bow——

A. Yes.

Q. (Continuing): ——up until the next shot came from the submarine, how long a period of time, about, was it?

A. How long a period of time? Oh, that is difficult to say now. I am judging about forty-five seconds.

Q. So that there was no time in the sense of a great number of minutes that elapsed from the shot across your bow until the shots were directed against the vessel itself? A. Oh, no.

Q. I see.

A. Oh, no, that was a continuous affair, you know; there was one shell coming after another, you see.

Q. So there was no chance for those on board to seek safety between the shot across the bow and the next shot that was received from the submarine?

A. Oh, no, they were pretty much exposed.

Q. Well, did they follow in the same succession—that is, [32] was there a greater interval between the shot across your bow and the next shot than there was between the second shot and the third shot from the submarine, or did they come about the same? A. About the same.

Q. I see.

(Deposition of Hans O. Matthiesen.)

A. About the same. Of course, the firing took place in two series, you see. The first time——

Q. Was at this 1500 yard distance?

A. Yes, at the 1500 yard range he fired, I should judge, fifteen shots or so, and they came pretty close together, you see; and then, of course, he steamed across the bow of the “Lahaina” and bore down on the “Laihana” and then backed up against the midship section of the port side, and the rest of the shots he fired into the engine room, you see.

Q. From the port side?

A. From the port side, at very close range.

Q. I see.

A. I should say about 150 yards away.

Mr. Henry: I see. I think that is all, Captain.

Re-Recross-Examination

By Mr. Charles:

Q. Just one other question, Captain. Was there any investigation conducted by the Coast Guard, or by the Bureau of Marine Inspection and Navigation? A. There was.

Q. Concerning the casualties?

A. Concerning the casualties? [33]

Q. Yes.

A. Yes, sir, there was here in San Francisco.

Q. In San Francisco? A. Yes.

Q. About what month was that, do you remember?

A. That was in February—February or March, 1942.

Q. February or March, 1942?

(Deposition of Hans O. Matthiesen.)

A. Yes. I forget the exact date, you see.

Q. There were some proceedings taken against you or taken on your license in connection with the casualties? A. No, no.

Mr. Charles: I think that is all.

A. Since I reported it, you know, there was no proceedings of any nature or any kind.

Re-Redirect Examination

By Mr. Henry:

Q. Was that proceeding that Mr. Charles asked you about here in San Francisco, as to the loss of life?

A. It was in connection with the loss of life of these four men.

Q. And that was far afterwards in the lifeboat?

A. Yes, from the time that we left the "Lahaina" until we reached the shore of Hawaii.

Q. Was there any investigation of the sinking of the "Lahaina" itself in that hearing?

A. No, there was no investigation of that. That was done in Honolulu. [34]

Q. So this was the loss of life in the lifeboat—the hearing in San Francisco?

A. That is correct, yes.

Mr. Henry: That is all.

Re-Recross-Examination

By Mr. Charles:

Q. There was a hearing in Honolulu regarding the loss of the ship itself? A. Yes.

(Deposition of Hans O. Matthiesen.)

Q. But there were no proceedings taken against you in that connection, were there, Captain, at Honolulu?

A. You mean because of the loss of the ship or——

Q. Yes. A. No, none whatever.

Mr. Charles: That is all.

The Witness: I hope not.

Mr. Henry: That is all. [35]

PLAINTIFF'S EXHIBIT No. 1
FOR IDENTIFICATON

To whom it may concern:

I, Hans O. Matthiesen, Master of the American steamer "Lahaina" official number 220763, make the following statement in connection with the sinking of the SS Lahaina.

The SS Lahaina departed from Ahukini, Kauai, T. H. on December 4, 1941 with 1000 tons of cargo for San Francisco. On December 7, 1941 late in the afternoon I received a message in code from the 14th Naval District directing all vessels in the Pacific area to proceed immediately to nearest United States or friendly port. I changed course at once, heading for Honolulu and proceeding at about 11 knots. The following morning a Naval Patrol plane was sighted. I had the ship's numbers hoisted and the plane, circling the vessel, dipped his wings in recognition of our signal and flew away in the direction of Oahu. That same morn-

ing, at about 11:00 a.m., December 8, 1941, word was received from the 12th Naval District to proceed at top speed to San Francisco toward Pt. Conception. The course was changed immediately to comply with this order.

On December 11, 1941 at 1:40 p.m. L.S.T. in Latitude 27° 35' N, Longitude 147° 25' W, a submarine was sighted, firing across the vessel's bow from a 1500 yard range. The vessel was stopped at once and hove to, but the enemy kept on firing. In the meantime an S.O.S. was sent out by the radio operator. The signal for abandoning ship was then given and all hands proceeded to #2 lifeboat, #1 boat having been holed by shell fragments. When the lifeboat was clear of the ship with all hands accounted for, the enemy submarine was sighted crossing the bow of the Lahaina and coming close aboard on the port side to shell the engine room. While doing so the lifeboat was approximately one hundred yards from the submarine, recognizing the crew as Japanese by their appearance and by the commands that were given. While shelling the engine room from point blank range on the port side the Japanese kept the lifeboat under constant observation and had a machine gun assembled on the cigarette deck, covering the lifeboat. When the shelling was finished, about 25 shots in all, of which 12 were hits, the Japanese submarine steamed away on the surface in a northeasterly direction at 2:10 p.m.

The SS Lahaina sank the next day at 12:30 p.m., December 12, 1941, after an attempt to salvage her had to be given up.

Respectfully,

/s/ H. O. MATTHIESEN,
Master SS Lahaina.

San Francisco, February 20, 1942.

This statement was signed in our presence:

JAS. P. RASMUSSEN,
Witness.

C. B. ALEXANDER,
Witness.

Pltff's Ex. #1 for Iden. R. R. Roberson, Reporter.

State of California,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on the 21st day of June, 1945, at 11:15 o'clock a.m., before me, Ella Cook Kelly, a Notary Public in and for the City and County of San Francisco, State of California, at the office of Messrs. Hall, Henry & Oliver, 626 Matson Building, 215 Market Street, San Francisco, California, personally appeared pursuant to oral stipulation between counsel for the respective parties, Hans O. Matthiesen, a witness called on behalf of the plaintiff herein, and Messrs. Hall, Henry & Oliver, represented by Lyman Henry, Esquire, appeared as attorneys for the plaintiff; and Messrs. Lillick, Geary, Olson & Charles, represented by

Allan E. Charles, Esquire, appeared as attorneys for the defendant; and the said Hans O. Matthiesen being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by R. R. Roberson, a competent official and disinterested shorthand reporter, appointed by me for the purpose and acting under my direction and personal supervision, and was transcribed by him, and by stipulation between counsel for the respective parties the reading and signing of the deposition by the witness were waived.

And I further certify that the said deposition has been [36] retained by me for the purpose of securely sealing it in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that the exhibit hereto attached and marked "Plaintiff's Exhibit No. 1 for Identification," is the exhibit referred to and used in connection with the deposition of said witness.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of

San Francisco, State of California, this 2nd day of July, A. D. 1945.

[Seal] /s/ ELLA COOK KELLY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Dec. 23, 1948.

[Endorsed]: Filed July 3, 1945. [37]

In the Southern Division of the United States
District Court for the Northern District of
California

Civil Action No. 24575-G

MATSON NAVIGATION CO.,

Plaintiff,

against

WAR DAMAGE CORPORATION,

Defendant.

DEPOSITIONS OF GEORGE INSELMAN, M.
M. PEASE, HOWARD W. CANN AND
HAROLD L. WAYNE

Depositions of George Inselman, M. M. Pease, Howard W. Cann and Harold L. Wayne, taken on behalf of War Damage Corporation, pursuant to stipulation of counsel for the respective parties as to time and place, at No. 80 Maiden Lane, City and State of New York, on the 14th day of March, 1947, beginning at 11 o'clock a.m. and concluded on the same day.

Appearances:

Messrs. Hall, Henry & Oliver, 215 Market St., San Francisco, Cal., by Lyman Henry, Esq., of Counsel, for Plaintiff.

Messrs. Lillick, Geary, Olson & Charles, 311 California St., San Francisco, Cal., by Allen E. Charles, Esq., of Counsel, for Defendant.

It Is Stipulated and Agreed between counsel for the respective parties that reading, signing and filing of the within depositions are waived, and that the witnesses may be sworn by a Notary Public of the State of New York with the same force and effect as though sworn by a Judge of this Court.

All objections except as to the form of question are reserved for the trial of the action.

GEORGE INSELMAN

being duly sworn, testified as follows:

Direct Examination

By Mr. Charles:

Q. Mr. Inselman, your full name is George Inselman? A. Yes.

Q. What is your address?

A. At No. One Fifth Avenue.

Q. With what firm are you associated?

A. The Marine Office of America.

Q. In what capacity?

A. Ocean cargo underwriters.

Q. May I ask how long you have been in the insurance business? A. Thirty-one years. [2*]

*Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of George Inselman.)

Q. I wonder if you could tell us briefly what experience you have had in the insurance business, that is, the types of insurance work that you have done.

A. I was head of the Claims Department of the British & Foreign Marine Continental Company in New York, for fifteen years, during which time I dealt with ocean cargo losses, ocean hull losses, inland cargo losses and inland wet losses, so far as lighters and yachts and tugs. Thereafter I entered the underwriting field with the British & Foreign and served in that capacity until 1938, when I went with the Fire Association of Philadelphia.

Q. Just before we leave that first position you mentioned, what type of underwriting did you do?

A. All classes of marine underwriting; I was Assistant United States Manager of the British & Foreign when I left that office at its consolidation; also Vice-President of American-Foreign, a subsidiary of the British-Foreign, and director of the American-Foreign.

Q. And then you said in 1938 you entered the Fire Association of Philadelphia?

A. In 1938 I entered the Fire Association of Philadelphia as Marine General Agent, advancing through six or seven years to Marine Vice-President. During that period I did the same class of underwriting, including inland dry underwriting. [3]

Q. And during that period were you engaged in business in New York or Philadelphia?

(Deposition of George Inselman.)

A. Well, in New York only to the extent that we made frequent trips here to attend meetings and things of that character in connection with our business.

Q. How long did your association with that firm continue? A. Up till March 1, 1945.

Q. What did you do then?

A. I went with the Marine Office of America as ocean cargo underwriter.

Q. And you have continued as such an underwriter to date?

A. That is right, that is my capacity at the present time.

Q. During that period of time have you become familiar with the usages and customs of the insurance business? A. Yes.

Q. And you have a knowledge of the terminology used in the insurance business? A. Yes.

Q. May I ask, Mr. Inselman, whether the phrase "property in transit" is employed in the ocean marine insurance business? [4]

Mr. Henry: I object to the question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and an attempt to interpret legislation by reference to matters that are not relevant, and a part of the legislative history of the statute involved in this litigation.

Q. You may answer.

A. The term "property in transit" as I understand it in our business, applies to goods and merchandise, things capable of being conveyed. In the

(Deposition of George Inselman.)

pending ocean cargo policies we refer to goods and merchandise; several clauses speak of property, use the general term property, always applies to goods and merchandise.

Q. Are the words "in transit" used in connection with hulls?

A. I should say no, not in my experience.

Q. Could you tell us from your experience all the different classes of property that you can think of which are used in connection with the term "in transit"?

Mr. Henry: May it be understood that my objection and motion before made include in the objection that there has been no proper foundation laid as to this entire line of interrogation, without my repeating the objection each time. [5]

Mr. Charles: Yes, that is correct. With reference to the no foundation, what do you have in mind in that connection that might go to the form of the question?

Mr. Henry: I am raising the objection for the reason that I want to be certain that in spite of the fact that our objections are reserved in all matters except as to the form of the question, that there should be no misunderstanding and so that I would place you on notice here of my position, and if any of these questions on the technical consideration are to be considered as objectionable relating to the form of the question, I want it registered at this time.

(Deposition of George Inselman.)

Q. Let me ask you this, Mr. Inselman: Have the terms "in transit" been used in the marine insurance business for any length of time, or has the usage of those terms been rather recent?

A. The term "in transit" is used in connection with the insurance of goods and merchandise. It appears in the warehouse-to-warehouse clause.

Q. Do you know how long, as far as your own knowledge is concerned, those terms have been so used? [6]

A. I would answer that in this way, that the warehouse-to-warehouse clause is one established and adopted by the Insurance Institute—I think early in the thirties, I am not sure about that—but in connection with our insurance, the insurance of foods and cargo——

Mr. Henry: Ocean cargo.

A. (Continuing): ——in ocean—the practice has always been employed, and the policy only covers it in course of transit, even though the word "transit" does not appear in the contract.

Q. I want to go back just a moment; what I wanted to bring out if possible is whether the words themselves "in transit" have been familiar words in the insurance business for only a brief period of time or have they been used during a large part, and if so, about how much of the time that you have been engaged in the insurance business?

A. I think the word "transit" is synonymous with the insurance of goods and merchandise under

(Deposition of George Inselman.)

ocean policies. That has been my experience, whether implied or express.

Q. About how long a period of time does your experience with those terms go back?

A. From the very beginning.

Q. Have you ever known the term "in transit" to be [7] used in connection with insurance of a ship?

A. No. I might qualify that, if I may, Mr. Charles, by saying that the word "transit" might apply in a case where they are shipping—I suppose a yacht might be considered as a ship; we have had occasion when we had insurance on tugs and steam yachts on deck, and of course we would insure those under the cargo form of policy, just as we would merchandise on the ship, and in that connection the word "transit" of course might appear in the policy where it related to that particular thing.

Q. But that is when a yacht is being carried as a cargo and not when a yacht is being navigated.

A. No, not when she is under way herself.

Q. Do you know, Mr. Inselman, whether war risk insurance on hulls was available during the year 1941 in commercial service?

A. I can answer that by saying that I wrote some war risk insurance on hulls at that time, in 1941.

(Deposition of George Inselman.)

Cross-Examination

By Mr. Henry:

Q. Mr. Inselman, you mentioned that the words "in transit" or the word "transit" although not appearing, frequently is implied in so-called cargo policies with a warehouse-to-warehouse clause, is that correct? [8]

A. That is correct.

Q. Who implies that, Mr. Inselman?

A. Well, it is usage, I can't quote the citations, but ocean cargo policies have never gone beyond covering in due course of transit. Any interruption in transit causes a break in the insurance.

Q. But the word "transit" is not used as a matter of common practice in those policies, is it?

A. Yes, it is used. The present warehouse-to-warehouse clause speaks of transit, which means that the goods are covered when in due course of transit from warehouse to warehouse. That is general, that is not specific.

Q. You say it is now used, is that a rather recent development?

A. I mean it is used in the warehouse-to-warehouse clause, which was adopted by the Institute. I can check that date. It goes back about fifteen or twenty years. I am not sure. I would have to refresh my memory on that.

Q. So that it is only in the warehouse-to-warehouse clause where the phrase "in transit" appears, is that correct—you don't recall without looking at some document, is that correct, Mr. Inselman?

(Deposition of George Inselman.)

A. Yes, that is true. I might put it this way; it does not appear except in the warehouse-to-warehouse [9] clause. I am looking at the policy merely to check what I think is the situation. That is the situation.

Q. When you say that is the situation, I am not sure that the record is clear.

A. You are asking whether the clause appeared in the policy, and I said in the warehouse-to-warehouse clause.

Q. And only there?

A. I might qualify that again by saying this, that ocean-carrying contracts are not wholly standard; companies are free to write their own form, and when I speak I am merely speaking of the policies I am dealing with and policies I have been dealing with, which are more or less generally alike; but you may find here and there they differ in form; whether the Atlantic Mutual or some other company have the word some other place, I don't know.

Q. Now, Mr. Inselman, have you in your preparation for the testimony that Mr. Charles is asking you to give here, undertaken any research as to the origin of the word or phrase "in transit"?

A. No, I can't say that I have, except that in dealing in claims matters as I have, it was always recognized more or less that ocean cargo policies only cover goods in due course of transit.

Q. In your experience that you mentioned, you also [10] said that you had had claims experience with hull insurance.

A. That is right.

(Deposition of George Inselman.)

Q. Do you recall ever hearing the phrase "in transit" or the word "transit" as descriptive of the vessel's voyage or progress at the time of reporting some casualty or loss that may have occurred?

A. No.

Q. Have you ever heard the expression that a vessel was transiting or was in transit through the Panama Canal, for example?

A. No.

Q. You have not, I assume, from what you said, Mr. Inselman, made any investigation or carried on any research as to the popular or dictionary meaning of the word "transit"?

A. I can't say that I have. When I speak of transit I speak of it in relation to our business, as we have considered it through the years in its practical application.

Q. As I understand it, however, the word "transit" or the phrase "in transit" as you have applied it to your business in your experience occurs as an actually used phrase in the policies only in the warehouse-to-warehouse clause?

A. In the ocean cargo policies, that is right. [11]

Q. In the warehouse-to-warehouse clause?

A. That is right.

Q. Now, Mr. Inselman, have you made any investigation or are you familiar with the statute that is involved in this litigation, which is the so-called amendment of Section 5-g of the Reconstruction Finance Corporation Act?

A. I have examined it.

(Deposition of George Inselman.)

Q. And you have more or less read the statute, is that right? A. That is right.

Q. At what time and on what occasion did you first read the statute?

A. Well, about a year and a half ago or thereabouts when I first undertook the settling of losses under the Act.

Q. And by whom were you employed at that time?

A. I was appointed by the President of the War Damage Corporation.

Q. Was that a sort of post of honor, you might say, a job that was thrown on you as a good citizen and taxpayer, or was it an official paying job by the War Damage?

A. It was analagous to a dollar-a-year job. There was no compensation as far as I was concerned.

Q. For what period of time did you have that position? [12]

A. About a year and a half, it could be a little longer, but I doubt it.

Q. But you had your private employment at the same time? A. Oh, yes.

Q. And in the course of your work upon that so-called dollar-a-year assignment, did you have any occasion to apply the phrase "in transit" to any of the claims or problems that you were considering for the War Damage Corporation?

A. Well, as I analyzed it in the light of my experience in marine insurance matters, I con-

(Deposition of George Inselman.)

strued that term as appearing in the Act as applying to property in the nature of goods or things that were capable of being carried.

Q. Well, now, Mr. Inselman, I don't know whether I made my question clear, but what I want to get at is, was that merely your assumption without the need for any actual application or test by you of the correctness of your assumption?

A. Well, I may say that I read the legislative history attached to the adoption of the Act, and while I am not a qualified expert in that connection and hesitate to talk about it, I did read it, and that assisted me in arriving at that point of view which I did arrive at. [13]

Q. As far as the point of view that you arrived at, was that in a fair sense a matter of academic construction by you, since, if it is a fact, you had had no occasion to consider it as an actual problem in an individual claim or case that was presented?

A. Yes, I did. I had occasion to consider it in connection with a case. I would have to check back the records; a fishing vessel was lost here off the Coast.

Q. When was that vessel lost, in what period, if you remember?

A. During the war some time, I think in early 1942.

Q. Now, in reading the legislative history as you mentioned, do you recall what passages or documents you actually read on that?

(Deposition of George Inselman.)

A. No; I read that quite some time ago and I am afraid I can't answer that intelligently.

Q. In any of the legislative history that you read do you recall seeing a transcript or report of colloquy on the floor of either the Senate or the House of Representatives where questions were asked whether this proposed amendment that finally became the amendment in the law that we are considering here, would cover the vessels and cargoes subject to the then present and occurring submarine warfare on the Atlantic Coast? [14]

A. As I recall it, the legislation, at least one phase of the instigation of it, I think arose, when a Senator or some Representative from Hawaii raised the point that Hawaii was not being on a parity with United States citizens in connection with property in transit in the United States which might suffer loss by enemy action; and I also gathered, as I read, that the purpose of the Act was to apply primarily to distress situations, legislation of an emergency nature.

Q. Well, Mr. Inselman, according to your interpretation the word "property" in the Act would under no circumstances include a merchant vessel, that is, the hull of a merchant vessel, is that correct?

A. I don't think it was contemplated.

Q. In reading any of this legislative history that you have mentioned, did you read merely the committee reports or did you also read the discussions on the floor of the House of Representatives?

(Deposition of George Inselman.)

A. I think I read some of the discussions on the floor, too, as I recall it.

Q. But you have no recollection of any colloquy there that the proposed amendment would cover vessels and cargoes?

A. No. Pardon me, vessels and cargoes you say?

Q. That is right.

A. No, I can't say that I do specifically. When you speak of colloquy just what do you have in mind, what phraseology?

Q. Well, perhaps I can make it a little clearer; that there was a debate on the floor of the House of Representatives and on the floor of the Senate, in which debate some Senators, for example, would ask questions and they would receive answers from other proponents or other Senators on the floor, and I am merely mentioning that generally as a colloquy between men on the floor of the Houses of Congress, which is reported in the Congressional Record.

A. A general discession revolving around the loss of property by enemy action.

Q. Mr. Inselman, if one were to mention to you—a person inexperienced as myself perhaps—that a vessel was in transit between Honolulu and San Francisco, there would not be any question in your mind as to what the vessel was engaged in at the time, from the standpoint of property?

A. I understand, the word “transit” is quite clear, but when you use that language, when the vessel was on a voyage between Honolulu and San

(Deposition of George Inselman.)

Francisco, the word "transit" is never used in connection with passage, not to my knowledge. [16]

Q. Is the word "voyage" ever used in connection with cargo; in other words, would you say the cargo was on voyage from Honolulu to San Francisco?

A. Yes, we use the word "voyage" in connection with cargoes, and the policies, as I said before, speak of "transit" as well.

Q. You used the word "voyage" in connection with cargo? A. Yes.

Q. You speak of cargo being on a voyage?

A. It is used, I mean as it is there, a colloquial term in the business. We speak of a cargo being on voyage, too.

Q. Is that a common expression, that cargo is on a voyage, or is that in a sense a barbarism, you might say?

A. The term is not used in connection with cargo as much as it is used in connection with hulls. We speak of cargo in transit, but you could say a cargo as being transported on a voyage from New York to Spain or something like that.

Q. In the same fashion, is it not true, Mr. Inselman, in popular speech, that you can refer to a vessel being in transit between two ports?

A. No, I would not say so. [17]

Q. But you have no doubt as to what was intended by the speaker, you would know what the speaker intended to mean, namely, that the vessel was on a voyage from San Francisco to Honolulu, you would know that the speaker meant the vessel was in transit?

(Deposition of George Inselman.)

A. It might arouse my curiosity, I might wonder whether the vessel possibly might be carried, if it happened to be a small ship. You speak of a tug being in transit between Ohio and South America, but you certainly would not consider that tug being under her own power.

Q. If that were a tug, as miscellaneous property carried on a ship?

A. If you sent a tug on a voyage then I consider that tug as being on a voyage here between two points.

Q. Now there is, as I think you will agree, some equipment on a vessel that at least with some frequency is owned by others, such as radio equipment that is merely rented on a certain fee basis to the owner or operator of the vessel; you are familiar with that general situation, are you?

A. Oh, yes.

Q. Would you say that the property constituting such property owned by other persons could fairly be said to be in transit from Honolulu, for example, to San Francisco, [18] when the vessel is on a voyage from Honolulu to San Francisco?

A. I consider that to be property in transit, except when we speak of property in transit we speak of something which begins at one point and is carried to another point and discharged. When we use the term "transit," I should say that property would be in transit as well, except I would call it property being carried on the vessel rather than in transit.

(Deposition of George Inselman.)

Q. Now, in your inland marine experience you have had occasion, I assume, to insure property carried solely by land in railroad or truck?

A. That is right.

Q. And may I ask you then whether you would ever insure the vehicle under inland marine policies?

A. We have insured trucks and also tractors under inland marine policies.

Q. Are those all on a time basis, a contract basis?

A. Yearly basis, annual basis.

Q. So that there is no occasion in those policies to make any reference to the points between which the trucks may travel?

A. Unless it is confined within certain areas or over the lines of the Southern Pacific or over the lines of the [19] New York Central, or whatever the case might be.

Q. Incidentally, are you a Latin student at all, Mr. Inselman?

A. No.

Q. Have you ever been?

A. I play around with it once in a while.

Q. You haven't any idea then what the Latin origin of the word "transit" is?

A. I did know it. I saw that not so long ago. No, I don't remember that.

Q. You may remember the very difficult and irregular verb "ire" meaning to go, and the word "trans" in Latin, across or through; do you remember that?

A. I don't recall that.

(Deposition of George Inselman.)

Q. This document that you referred to, which I assume was for refreshing your recollection early in your direct examination by Mr. Charles, does not contain the word or phrase "in transit," is that correct? A. Yes.

Q. You mean that is correct. it does not?

A. Yes, that is correct. I would just like to read this again before I answer that. There is nothing in this form here, this is not the complete form; it is just the basic underlying form.

(Deposition closed.) [20]

M. M. PEASE,

being duly sworn, testified as follows;

Direct Examination

By Mr. Charles:

Q. What is your full name?

A. M. M. Pease.

Q. How long have you been in the marine business? A. Thirty years.

Q. Are you familiar with the customs and usage and terminology in that business? A. Yes.

Q. Let me ask you whether in your experience in the insurance business ships are referred to as property. A. No, they are not.

Q. May I ask you whether ships on a voyage are spoken of as in transit?

A. I have never heard that term—ships in transit did you say?

Q. Yes.

(Deposition of M. M. Pease.)

A. No, they are spoken of as on voyage rather than transit.

Q. In connection with what kind of property are the words "in transit" used?

A. As cargo, goods in transit. Anything that a ship carries in the nature of goods will be considered as being [21] in transit.

Mr. Henry: Mr. Charles, may it be understood that the same objections apply to each one of these witnesses, no proper foundation laid?

Mr. Charles: That is right.

Cross-Examination

By Mr. Henry:

Q. Mr. Pease, are you familiar with Section 5-g of the War R.F.C. Act as amended by Congress of the United States in March 1942?

A. You are referring to what?

Q. The so-called War Damage Corporation Act.

A. To a degree. Do you mean the statute?

Q. Yes, the statute itself.

A. Well, to a degree.

Q. Have you read it?

A. No, I have never studied it or read any of the articles.

Q. You haven't read the actual text of the Act, but with reference to general discussion rather than the complete Act; have you read any of the legislative history concerning the adoption of the Act, the actual text of the legislative history?

A. I presume so, but only as it has been quoted in [22] the pres, not beyond that.

(Deposition of M. M. Pease.)

Q. So it would be just mere accident, you might say, that you might have seen it?

A. That is right.

Q. Now, you mentioned that in marine insurance parlance vessels are never referred to as property, is that correct?

A. That is right.

Q. However, I don't assume you would dispute the fact that they are property?

A. They are property, yes, in the sense of that word or analogy.

Q. And in the sense that they are physical property that can be seen and touched, et cetera, isn't that right?

A. Well, possibly that is true, but not in the parlance of the business.

Q. Now, I assume, then, that you are not familiar with the fact that the War Damage Corporation Statute, Section 5-g of the Reconstruction Finance Corporation Act as amended in March of 1942, when being discussed on the floor of the Houses of Congress of the United States was considered at least by some of the legislators as including vessels as well as cargoes?

Mr. Charles: I object to the question on the [23] ground that it states what I believe not to be the fact.

A. No, I was not familiar with that.

Q. And also, Mr. Pease, have you ever in your experience in connection with shipping and marine insurance seen or heard a reference to a vessel in transit or transiting any particular area of her voyage or parts of the world?

(Deposition of M. M. Pease.)

A. If I understand you correctly, I have never heard it spoken of as being in transit between two points.

Q. You never heard the expression that a vessel—and I am speaking of a moderately large cargo vessel, let us say—was in transit through the Panama Canal?

A. No; I have heard it spoken of as being on a voyage, or generally speaking you think of it going through, rather than using the word “transit,” which is seldom used, if ever.

Q. You have, then, heard it on occasion?

A. I can't recall ever having heard it.

Q. There would be doubt in your mind, though, as to what the speaker that used the phrase or the sentence, let us say, “the vessel Lahaina was in transit between Honolulu and San Francisco” intended to convey; what would your understanding be of the speaker's intention? [24]

A. I could not very well speak for the proposer, the speaker's intention; I would not know what he meant.

Q. What would you understand such a quoted sentence to mean, Mr. Pease?

A. Well, it is a most unusual application of the word “transit,” but he must have meant voyage, I would say.

Q. Do you ever speak of cargo as being on a voyage, or is cargo always in transit?

(Deposition of M. M. Pease.)

A. You seldom speak or use the word either way. It is more in the nature of a shipment by a vessel between two points; that is all; you don't speak of it as a cargo in transit; you speak of it as cargo on a ship, on a voyage.

Q. Then even with respect to cargo the phrase "in transit" is seldom used, is that correct?

A. It is not generally employed. It is employed more in connection with shore risk property, than voyage risk.

Q. And by shore risk you mean cargo carried by truck or rail? A. That is right.

Q. So far as the general and common use in the sense of frequency of use of the phrase "in transit" with respect to marine insurance, that is rare? [25]

A. I would say it was rare, yes.

(Deposition closed.) [26]

HOWARD W. CANN,

being duly sworn, testified as follows;

Direct Examination

By Mr. Charles:

Q. What is your address?

A. 363 Parker Street, Newark, New Jersey.

Q. What is your present position?

A. Manager of the Railroad Insurance Association.

Q. May I ask what that association is, what type of business it is?

(Deposition Howard W. Cann.)

A. It is a combination of fourteen insurance companies insuring properties and liabilities of railroads for various perils, explosion, fire, et cetera.

Q. How long have you been in the insurance business, Mr. Cann, approximately?

A. Five years with the Ocean Accident Guarantee Corporation; twelve years as Insurance Manager for the National Dairy Products Corporation; two years with the American Mutual; five and a half years as Assistant Manager and Manager of the Railroad Insurance Association.

Q. And through that experience have you become familiar with the customs and usages in the insurance business?

A. Quite completely, yes.

Mr. Henry: May the same objection run to all of this witness's testimony in this line of interrogation without repeating it here?

Mr. Charles: That is right.

Q. Are you familiar with the terminology that is used in the insurance business?

A. Yes.

Q. Have you ever heard the terms "in transit" used in connection with insurance, Mr. Cann?

A. Very frequently.

Q. I wonder if you could tell us in what connection the terms "in transit" are used and in what connection they are not used?

A. They are used primarily with the movement of merchandise, whether on land or on sea, and not used in connection with fixed properties.

Q. Can you tell us whether those terms are used in connection with the insurance of rolling stock?

(Deposition Howard W. Cann.)

A. Not generally; only in one specific case that I can think of.

Q. What is that case?

A. At the present time practically all railroads of the country are changing from steam power to Diesel power. When a Diesel locomotive is purchased and delivered to the [28] purchasing railroad that locomotive may travel on its own wheels over tracks, but not under its own power, being drawn in a train with other cars and under a bill of lading just the same as any other merchandise in transit. That is all I can think of.

Q. That is the only time, when a locomotive would be regarded as property in transit, when it is not under its own power, but when it is being conveyed, is that right? A. That is correct.

Q. Are trains in operation insured as property in transit? A. No.

Q. Do you know of any other conveyances that are insured as in transit? A. No.

Q. The words "in transit" when used with reference to the insurance of merchandise, can you tell us whether those words have been used for a long time or whether the terms have only been employed recently?

A. To the best of my knowledge they have been used for many, many years.

Cross-Examination

By Mr. Henry:

Q. Mr. Cann, have you ever been employed by a marine [29] insurance company? A. No.

(Deposition Howard W. Cann.)

Q. In connection with your present employment with the Railroad Insurance Association, do you place any marine insurance?

A. Inland Marine.

Q. Inland marine, so that the record may be clear on the matter, Mr. Cann, does not have any connection with water-borne commerce, is that correct?

A. That is not correct; inland marine insurance can apply to certain harbors and rivers.

Q. I should say ocean-borne commerce.

A. No, it does not include ocean-borne commerce.

Q. In any of your experience during your entire career have you placed or handled ocean marine insurance? A. No.

Q. Are you familiar at all with the so-called March, 1942 amendment to the Reconstruction Finance Corporation Act, which is, incidentally, Mr. Cann, the statute involved in this litigation, known as 5-g.

A. I am thoroughly familiar with the rules and regulations and provisions of the War Damage Corporation, but I am not familiar with the Act. I am familiar with the War Damage Corporation rules and regulations growing out of that Act. [30]

Q. Did you have anything to do with those regulations in connection with ocean marine coverage?

A. Not with ocean marine.

Q. Let us assume, Mr. Cann, that someone in describing the whereabouts or journey of a train said

(Deposition Howard W. Cann.)

that the train was in transit from New York to San Francisco; would you have any doubt in your own mind as to what was intended by the speaker to describe the activity of that train?

A. I would say that the train was en route, it was not in transit.

Q. But if a person in the course of some statement to you used the phrase "in transit" to describe the trip from San Francisco to New York or New York to San Francisco, you would know what he meant, wouldn't you?

A. I might know what he meant, but I would think that the term was misapplied.

Q. Have you made any investigation or study in connection with preparing for this deposition, as to the origin and meaning of the phrase or term "in transit"?

A. No, no preparation of any kind.

Mr. Henry: That is all.

Redirect Examination

By Mr. Charles:

Q. In connection with Mr. Henry's prior question, if [31] instead of speaking of a train in transit from San Francisco to New York, someone spoke to you of a locomotive in transit, what would you take that to mean, assuming he was an insurance man?

A. To me it could mean only one thing, and that was that the locomotive was not traveling under its

own power but was being drawn by other means of power, and then only on a bill of lading given by the carrying road.

(Deposition closed.) [32]

HAROLD L. WAYNE,

being duly sworn, testified as follows;

Direct Examination

By Mr. Charles:

Q. Mr. Wayne, what is your present position?

A. I am the Manager of the Inland Marine Underwriters Association and of the Inland Marine Insurance Bureau.

Q. Would you tell us what that association and bureau are?

A. The association is a voluntary organization of companies which prescribes advisory forms and rates with respect to its members on various classifications of inland marine insurance; and the bureau is a statutory licensed rate organization which performs the same function in states in which it is licensed to act.

Q. How many years have you been connected with the insurance business?

A. Twenty-five.

Q. Could you tell us in what other positions you have served prior to your present one?

A. Prior to my present position I was Executive Head of Albert Wilcox Co. Inc., which was an organization performing some of the functions now

(Deposition of Harold L. Wayne.)

performed by our present organization and in addition to that operated a number of ocean marine so-called syndicates and pools and performed [33] other service for insurance companies, and during the war for the Government.

Q. When you speak of for the Government among the services performed was service for the War Damage Corporation, is that correct?

A. That is correct. That was a personal service which I performed as a representative of the marine interests on the War Damage Corporation Committee.

Q. And by marine interests you mean the marine insurance companies?

A. The marine insurance companies.

Q. And you know then, that insurance companies did confer with the Government Officials in connection with the War Damage Corporation Program?

Mr. Henry: I will object to the question as leading, and that it is indefinite and vague and not confined to time or place.

Mr. Charles: I will withdraw the question.

Q. Did you yourself give any advice or assistance to the insurance program of the War Damage Corporation?

Mr. Henry: I object to the question as being indefinite and not defining the time and place and occasion for any such advice.

Q. To get back, Mr. Wayne, to your experience, did [34] you occupy any other positions in the in-

(Deposition of Harold L. Wayne.)

insurance field prior to your association with Albert Wilcox & Co.?

A. Well, my position with Albert Wilcox & Co. grew out of my first connection with the insurance business, which was with Wilcox, Peck & Hughes in 1921. When I joined that organization Albert Wilcox & Co. was then a part of Wilcox, Peck & Hughes, and became a separate organization after the merger of Wilcox, Peck & Hughes with Johnson & Higgins in 1924.

Q. Have you become generally familiar with insurance usages and customs in the marine business?

A. Yes, sir.

Q. And are you generally familiar with insurance terminology? A. Yes.

Mr. Henry: Just as a matter of caution, Mr. Charles, it is understood that the same objection that I raised on the first deposition will continue to this entire line.

Mr. Charles: That is correct.

Q. Mr. Wayne, I wonder if you can tell us whether you have heard the words "in transit" used in connection with insurance?

A. For all the years I have been in business, yes. [35]

Q. Can you tell us in what connection the words "in transit" are employed?

A. They are employed to describe peril assumed by underwriters on goods while such goods and

(Deposition of Harold L. Wayne.)

merchandise of whatever description are being transported from place to place by the particular mode of transportation which may be set forth in the policy or which may prevail between the two places.

Q. Can you tell us whether the terms "in transit" are used in connection with insurance of a vehicle or of a ship?

A. Never unless the vehicle or the ship itself is to be transported on another vehicle from one place to another place, such for example as the transportation of a yacht or motor vehicle from its place of manufacture to its seaport or place of sale.

Q. Do you know anything about airplanes, whether airplanes are ever insured as merchandise in transit?

A. I think the same reply would hold true there, that if an airplane were to be insured as property in transit it would be insured while it was being transported either by land or sea or air from one place to another, only not under its own power.

Q. Have you ever seen a policy where the words "in [36] transit" were used in connection with insurance of a carrier or the conveyance itself when operating under its own power or motion?

A. Never.

Q. Mr. Wayne, how much of the inland marine insurance that is written in the United States has some relation to your organization?

(Deposition of Harold L. Wayne.)

Mr. Henry: I object to the question as vague and indefinite.

Mr. Charles: I will admit it is vague.

Q. What I am asking you——

A. I don't know the answer.

Q. ——could you give us any idea as to the extent of the inland insurance underwriting of the companies which your association represents?

A. Well, it represents to one extent all of the inland underwriting of the companies, inasmuch as the association concerns itself with inland marine activities as a whole in so far as the prescribing of forms, rates and rules is concerned, but in that field represents approximately fifty or sixty per cent of the total writings of the companies; but in premium volume from seventy million dollars to ninety million dollars a year in premiums. [37]

Q. Do these companies insure ships, do you know?

A. The very great majority of the companies do insure ships.

Q. Can you tell us to what extent inland marine concerns itself with the insurance of property that is transported over water?

A. To the extent that such property is transported over the inland waterways of the United States, and with some companies over the coastal waterways, excluding intercoastal shipments, which are always classed ocean rates.

Q. Mr. Wayne, do you have any relationship to the War Risk Reinsurance Exchange?

(Deposition of Harold L. Wayne.)

A. Yes, I set up the operations of the clearing organization for the War Shipping Administration during the war, handling all of the cargo, and even of the War Shipping Administration; in other words, it was all cleared through my organization.

Q. Are you familiar with the private field of war risk insurance as it existed during the war?

A. Yes, sir.

Q. Can you tell us whether during the year 1941 war risk insurance on hulls was available in the commercial market? [38]

A. It was available.

Q. And do you know whether that was true all of 1941? A. That was true all during 1941.

Q. I wonder if you could tell us briefly, Mr. Wayne, what, if any, association you have had with the War Damage Corporation?

A. I was from the very earliest days Marine Representative, serving as the companies' committee for the War Damage Corporation.

Q. What was that companies' committee?

A. That was a committee that was organized to set up the operations of the War Damage Corporation and to devise the forms which were to be issued and the rates which were to be charged. My concern was with the transportation end of that field.

Q. When you speak of companies, are you referring to private companies or a company of the R.F.C.

A. Companies that acted as fiduciaries, yes, sir, and also to the R.F.C.

(Deposition of Harold L. Wayne.)

Q. And those companies which acted as fiduciary, what kind of companies were those?

A. Those were the same companies which were members of our organization, the Fire and Marine companies of the country. [39]

Q. Have you any approximate idea as to about how soon after the outbreak of war on December 7, 1941 you became interested in the War Damage Corporation?

A. I have a very distinct recollection of participating in meetings in both New York and Washington, the early days of 1942—during the month of January, for that matter.

Q. You mean 1942?

A. 1942. I believe that the first discussion in which I participated took place either the latter part of December, 1941 or the very early part of January, 1942.

Q. Were any of these conferences with Government Officials or employees of the Government, or were they all with other insurance men?

A. No, there were many of them with representatives of the Government, and others with company men.

Q. You mentioned when you were President of Albert Wilcox & Co. A. Yes.

Q. When you were handling the affairs of Albert Wilcox & Co. you acted for the War Damage Corporation; can you tell us briefly in what capacity?

(Deposition of Harold L. Wayne.)

A. Perhaps the best description would be as the Inland Marine Expert of the War Damage Corporation. [40]

Q. And did that organization have anything to do with handling of claims against the War Damage Corporation?

A. Yes, we subsequently handled a number of marine claims for the War Damage Corporation; as a matter of fact we were the clearing organization for those claims.

Mr. Henry: Were those marine?

The Witness: Yes, primarily marine, more marine than inland.

Q. Did you have anything to do with the preparation of the insurance policy forms that were issued by the War Damage Corporation?

A. Yes, with the preparation of the riders or forms which were used in connection with transport insurance to be furnished by the War Damage Corporation.

Q. Can you tell us whether there was any in transit form of insurance that was issued by the War Damage Corporation?

A. Yes, there was a form issued by the War Damage Corporation which covered property in transit.

Q. Can you tell us what type of property was covered by that?

Mr. Henry: I object to the question on the ground that it does not identify the time that these

(Deposition of Harold L. Wayne.)

forms [41] were issued or whether it has any bearing upon the period involved in this dispute.

A. The War Damage Corporation transport policies covered any and all kinds of property of the assured which was transported or to be transported from place to place within the territory covered by the War Damage Corporation, either in the United States or in the Territory of Hawaii or in Alaska. There were two forms, one covered specific transit risks, or what was termed trip transit risks in business; the other was an open form which covered any shipments the assured might make during the currency of the policy, and subject to reports of the values of those shipments.

Q. Did those policies cover the hulls of ships?

A. Never

Q. Or any vehicles? A. Never.

Cross-Examination

By Mr. Henry:

Q. Mr. Wayne, these forms that you say that you prepared, and the riders, et cetera, none of those were for the period from December 7, 1941 to July 1, 1942, were they?

A. To the best of my recollection, no.

Q. Isn't it a fact, to refresh your recollection, that all of your work in connection with the preparation of [42] these forms related to the period subsequent to July 1, 1942 and was during the period from July 1, 1942 onwards, when regular in-

(Deposition of Harold L. Wayne.)

insurance policies were issued and premiums paid?

A. That is the best of my recollection.

Q. So that you had nothing to do with the determination of forms or conditions of policies in connection with the War Damage Corporation for the period prior to the actual issuance of policies that were of such a nature that premiums were required?

A. My recollection is that there were no policies issued during that period.

Q. And it is your understanding that such coverage as was given was by virtue of the statute and the announcement of the Government, and no premiums were charged?

A. Given, as we directed it at the time, under the free fund issued by the Congress for the payment of certain types of losses.

Q. So that your work with the War Damage Corporation did not relate to the free fund period?

A. Except that we were later called upon for our services in connection with the claims which were filed with the War Damage Corporation during that free period.

Q. But as far as the making of the policies for that free period, et cetera, you had nothing to do with that? [43]

A. That is right.

Q. You said in reply to one of Mr. Charles' questions that there was marine war risk insurance available for vessels, available to owners of vessels, during this entire year 1941, is that correct?

A. Yes, sir.

(Deposition of Harold L. Wayne.)

Q. There was also like insurance available, was there not, for the cargoes on such vessels in the year 1941? A. Yes, sir.

Q. Isn't it your understanding, Mr. Wayne, that cargoes, at least from your testimony, were covered by this free fund if they were in transit between ports of the United States and possessions of the United States without payment of premium for the period covered by December 7, 1941 to July 1, 1942?

A. I don't think so, because I don't recall what the provisions of the statute were with respect to the free insurance. I do recall definitely that there was a fund, I believe it was one hundred million dollars, appropriated by Congress to pay certain types of losses in the interim between Pearl Harbor and the time that the War Damage Corporation began to issue policies. I think that was July 1, 1942, I am not sure of the dates. [44]

Q. Just attempting to refresh your recollection here, isn't it a fact, Mr. Wayne, that the fund started out as a one hundred million dollar fund under executive announcement, and then by virtue of the so-called War Damage Corporation Statute, which was adopted in March of 1942, that fund was increased to one billion dollars?

A. I have no clear recollection of that. I do know that the one hundred million dollar fund became a billion dollar fund, but whether the billion dollars was appropriated to cover as free insurance I have no recollection at all.

(Deposition of Harold L. Wayne.)

Q. But again you had nothing to do with the free insurance program?

A. Not at the time; I did later on.

Q. But you also had nothing to do with the legislation finally adopted by Congress and which is the subject of this litigation we are now taking testimony on; you had nothing to do with that?

A. Nothing at all.

Q. Did you ever review any of the legislative history or proceedings leading up to the legislation?

A. Several years ago in connection with the work we were performing for the War Damage Corporation in the handling of claims which had been filed covering losses occurring [45] during what you have termed the free period.

Q. Did any of your review bring to your attention the fact that on the floor of Congress, that is, on the floor of the Senate or the House, there was discussion between the legislators there that the insurance that would be provided during this free period at least, would cover both vessels and cargoes?

Mr. Charles: I object to that question on the ground that the reference to legislative history had reference to the Merchant Marine Act of 1936 as amended, and not to the War Damage Corporation, known as Section 5-g, and therefore the question is misleading.

Mr. Henry: If I may have the question re-

(Deposition of Harold L. Wayne.)

peated, and if you will instruct the witness to answer it.

Mr. Charles: Yes, you may answer it.

(Question read as above recorded.)

A. I have no recollection of it.

Q. Did you have anything to do, Mr. Wayne, in any of your later work for the War Damage Corporation, in attempting to correlate the insurance that was to be provided by the War Shipping Administration with the insurance that was to be provided by the War Damage Corporation?

A. Only indirectly, through my activities on the committee. [46]

Q. And that again related to the period after July 1, 1942, is that correct?

A. To the best of my recollection, yes.

Q. At any rate, it was after the free period?

A. It was in connection with the business which was to be insured under specific policies.

Q. And those policies were all policy forms after the free period, isn't that right?

A. Yes. However, I think the record ought to be clear on that. That is my best recollection.

Q. You didn't issue any policies or have anything to do with issuing any policies other than those for which a premium was to be charged?

A. Yes.

Q. So that it was not free insurance?

A. It was not, sir.

(Deposition of Harold L. Wayne.)

Q. And that insurance, incidentally, that was not the so-called free insurance, but was placed entirely on the voluntary request of the property owner, is that right? A. Yes, sir.

Q. In connection with the phrase "in transit," will you assume that the ship owner stated to you that "My vessel being a cargo vessel of between seven thousand and [47] eight thousand deadweight tons is now in transit between Honolulu, Hawaiian Islands and San Francisco, California." What would you understand the vessel owner to mean?

A. That the ship was en route between the two ports.

Q. In other words, that she was on a voyage from Honolulu to San Francisco.

A. From Honolulu to San Francisco.

Q. In connection with your marine insurance experience, have you had occasion, or did you have occasion to process claims of a purely ocean marine character? A. Yes, sir.

Q. Would that be in connection with hull insurance as well as cargo insurance?

A. Yes, both hull and cargo insurance, P. and I., as well.

Q. P. and I.?

A. Very little P. and I.; the same for foreign countries.

Q. Do you recall any Master's report or casualty report in which the narration regarding the circumstances and general conditions of such a casualty

(Deposition of Harold L. Wayne.)

might have contained a statement to the effect that the vessel was at the time of the casualty in transit in certain waters?

A. No, and it would have made absolutely no impression [48] on me had I read of such a statement in the Master's report.

Q. In other words, there may have been such a statement but you have no recollection on your part?

A. A master may have used the words "in transit" in referring to his voyage, but the words would have created no particular impression, any more so than the usage of words by anyone else would have.

Q. But again you would understand, if such a reference had been made, that the vessel was in transit, that she was enroute from certain points to other points, is that correct? A. Yes, sir.

Q. Now, all these so-called in transit policies or forms that you were instrumental in devising or assisting in making up for the War Damage Corporation related to inland marine and cargo insurance, is that right? A. Yes, sir.

Q. And they were all subsequent to the free period? A. That is right.

Q. And by free period we are referring to the general coverage that was granted without policy application and without policy form?

A. Yes, sir.

Q. Do you know anything about the availability of [49] ocean marine insurance in the period from

(Deposition of Harold L. Wayne.)

December 7, 1941 to let us say December 20, 1941 for vessels at sea between Honolulu and San Francisco?

A. To the very best of my recollection such insurance was available at all times, including the period between December 7th and December 20th.

Q. On her voyage and in transit, if I can use the term, Mr. Wayne, at the time of Pearl Harbor, that is after December 7, 1941?

A. Yes, it was not at all unusual for the marine market at any time, and including that period, to cover a risk while it was actually en route, whether that would be the vessel itself or the cargo in such vessel.

Q. And would that be true if the whereabouts, or the virtual existence of the vessel was unknown at the time?

A. Yes, sir.

Q. That was also true, wasn't it, Mr. Wayne, of cargo?

A. That was also true of cargo.

Q. There was no distinction in that regard between hull and cargo?

A. No, the insurance as a matter of fact would be written warranted no known or reported loss, and in some cases with the time of the attachment of the policy very [50] clearly indicated so that a loss occurring prior to the attachment hour or minute would be excluded.

Q. Isn't it a fact that during that very grave emergency period for the few weeks following December 7, 1941, that the insurance market and the

(Deposition of Harold L. Wayne.)

general transmission of information was in a very difficult and uncertain condition?

A. That is true.

Q. So that while insurance could in a general sense be considered available, it was still subject to grave conditions, from the timing standpoint and the premium standpoint of obtaining back coverage?

A. Well, from the time or premium standpoint, of course insurance would be placed either in this market or the London market, which was also available, and the premium would be based upon that rate which the underwriter felt was proper for the risk, considering all of the circumstances.

Q. And one of the circumstances was the general uncertainty that existed at the time, is that correct?

A. Yes, and the disposition of the vessel, if cargo was insured, its location.

Q. Do you know whether the United States Maritime Commission was at that time issuing policies of ocean [51] marine insurance—war risk I am speaking of now—in the period from December 7th to December 20, 1941?

A. Yes, the War Shipping Administration Maritime Commission was issuing war risk policies I believe, during that period.

Q. You have no direct knowledge?

A. I have no distinct knowledge. However, that is a matter which could be determined from the records in very quick order.

(Deposition of Harold L. Wayne.)

Q. Do you know what fund, if any, the Maritime Commission had available for such purpose?

A. No, I have no recollection of that.

Q. And you have no knowledge therefore, as a private underwriter, whether you would consider that the insurance that might be obtained, if it were obtainable from the Maritime Commission in that period, was adequately covered by a sufficient fund?

A. No.

Redirect Examination

By Mr. Charles:

Q. Were there any difficulties, Mr. Wayne, in connection with some of the war risk insurance on hulls in November of 1941?

A. In November of 1941, that is prior to Pearl Harbor; none whatever. [52]

Recross-Examination

By Mr. Henry:

Q. Did you have anything to do with the placing of hull insurance in the period of November, 1941?

A. Nothing to do with the placing. As I said at the outset, I was engaged in the marine insurance business, and part of my job was to know what was going on in the marine insurance market.

Q. And at that time you were only interested in inland marine mainly?

A. No, at that time my primary interest was ocean marine, including the operation of the American Cargo War Risk Insurance Exchange, which was the companies' war risk organization.

(Deposition of Harold L. Wayne.)

Q. And at that time in November of 1941 and prior to Pearl Harbor, your work was mainly on cargo war risk insurance, is that right?

A. That is absolutely true.

Q. And you had nothing directly to do with hull war risk insurance? A. That is right.

Q. And at that time cargo war risk insurance was obtainable? A. Yes, sir.

Q. And it is your understanding from your general [53] information that hull war risk insurance was also obtainable? A. Yes.

Q. Although with respect to the latter you had nothing directly to do?

A. Nothing directly to do.

(Deposition closed.) [54]

I, Arthur C. Smith, a Notary Public in and for the County and State of New York, do hereby certify that on the 14th day of March, 1947, I took the foregoing depositions of George Inselman, M. M. Pease, Howard W. Cann and Harold L. Wayne, in shorthand, and thereafter reduced the same to type-writing and that the same is a true and accurate transcript of my shorthand notes, the signing, reading and filing thereof having been waived by counsel for both parties.

[Seal] /s/ ARTHUR C. SMITH,
154 Nassau Street,
New York 7, N. Y.

[Endorsed]: Filed April 8, 1947. [55]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 24575-G

In the Matter of:

MATSON NAVIGATION COMPANY,
a Corporation,

Plaintiff,

vs.

WAR DAMAGE CORPORATION,
a Corporation,

Defendant.

DEPOSITION

Washington, D. C.

Tuesday, March 18, 1947

Depositions of Mr. Matthias W. Knarr and Robert C. Goodale, witnesses of lawful age, taken on behalf of the Defendant in the above-entitled action, wherein Matson Navigation Company, a corporation, is the Plaintiff, and War Damage Corporation, a corporation, is the Defendant, pending in the Southern Division of the United States District Court for the Northern District of California, pursuant to stipulation, before Lloyd L. Harkins, a notary public in and for the District of Columbia, at the offices of the Reconstruction Finance Corporation, 811 Vermont Avenue, Northwest, Washington, D. C., at 10 o'clock a.m., Tuesday, March 18, 1947.

(Deposition of Matthias W. Knarr.)

Appearances:

On behalf of the Plaintiff: Lyman Henry.

On behalf of the Defendant: Allan E. Charles.

MATTHIAS W. KNARR

a witness of lawful age, was thereupon duly sworn and, being examined by counsel, testified as follows:

Direct Examination

By Mr. Charles:

Q. Will you state your full name for the record, please? A. Matthias W. Knarr.

Q. What is your position presently with the War Damage Corporation?

A. My present position with the War Damage Corporation is that of Secretary.

Q. Approximately how long have you been Secretary?

A. Since the latter part of September, 1942.

Q. Did you have any position with the War Damage Corporation prior to that time?

A. Yes, sir.

Q. What position was that? [2*]

A. I was Assistant Secretary, from the inception of the corporation, since December 13, 1941.

Q. And, as Secretary of the War Damage Corporation, do you have custody of its records?

A. As Secretary, I have custody of the corporation's records.

*Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of Matthias W. Knarr.)

Q. Can you tell us, Mr. Knarr, whether any regulations have been passed at any time by the War Damage Corporation?

A. Yes, Regulations A on the general program.

Q. Do you have a copy of those regulations?

A. Yes, I have copies of the regulation here, and two amendments to Regulations A.

Q. The Regulations A that you speak of, and which you have handed to me, state:

“Effective July 1, 1942”;

Is that correct?

A. Yes, sir; that is correct.

Mr. Charles: I would like at this time to offer in evidence Regulations A, the document which has been identified by the Secretary, Mr. Knarr.

Mr. Henry: I am going to register, out of an abundance of caution, the understanding that our objections are reserved until the time of trial. I am going to offer an objection to these so-called Regulations A on the ground that they are incompetent, irrelevant, immaterial, a self- [3] serving declaration, a self-serving document, and by its own terms, as you have stated, is effective July 1, 1942, and hence has no bearing upon the issues of the matter in controversy in this litigation.

(Regulations A was marked as Defendant's Exhibit No. 1 for identification.)

Q. (By Mr. Charles): You state, Mr. Knarr, that the regulations have been amended?

A. They are amended, yes.

(Deposition of Matthias W. Knarr.)

Q. Do you have any copies of the amendment?

A. I have copies of the amendments to the regulations.

Q. Can you tell us of what the first amendment consists? A. The first amendment——

Mr. Henry: I would like to have it understood that my objection, Mr. Charles, runs to this entire line of questioning, and also to the offer of these documents without the necessity of my repeating it.

Mr. Charles: Very well, Mr. Henry.

The Witness: The amendment to Regulations A, effective July 1, 1942, are the amendment of Rule 10.

Q. (By Mr. Charles): With what is that concerned?

A. It states that policies may be issued to mortgagees [4] or other holders of security or financial interests in property eligible for coverage under these regulations. It is quite a long amendment here.

Q. What is the date of that amendment?

A. It is effective July 1, 1942.

Q. Is this document you have handed me, entitled "Amendment to Regulations A" a true copy of the amendment to Rule 10, and to Rule 26.01 and to Rule 26; is that correct?

A. Yes, sir; that is correct.

Mr. Charles: I offer in evidence these amendments to Regulations A, and I will ask that they be marked as Defendant's Exhibit No. 2.

(Deposition of Matthias W. Knarr.)

(Amendment to Regulations A, effective July 1, 1942, was marked Defendant's Exhibit No. 2 for identification.)

Q. (By Mr. Charles): Were there any other amendments to Regulations A?

A. Yes, the amendment effective October 1, 1942.

Q. With what is that second amendment concerned?

A. That adds to Regulations A, Rule 26.02.

Q. With what is that concerned?

A. It relates to registered mail or express coverage for money and securities.

Q. Is this a true copy of that amendment?

A. That is a true copy.

Mr. Charles: I should like to offer in evidence this [5] document which Mr. Knarr has handed to me, entitled Amendment to Regulations A, which adds a new rule, Rule 26.02. I offer this in evidence as Defendant's Exhibit No. 3.

(Amendment to Regulations A effective October 1, 1942, was marked Defendant's Exhibit No. 3, for identification.)

Q. (By Mr. Charles): Other than these amendments, have there been any additional amendments or changes in Regulations A? A. No, sir.

Q. Can you state whether these regulations, as amended by these amendments, all of which have been designated as Defendant's Exhibits 1, 2 and 3, are still in force and effect?

A. They are still in force and effect.

(Deposition of Matthias W. Knarr.)

Q. Can you state, Mr. Knarr, whether or not these regulations A have been approved by the Secretary of Commerce?

A. They have been approved by the Secretary.

Q. Who was the Secretary of Commerce by whom they were approved?

A. Mr. Jesse Jones, who was the Secretary of Commerce then.

Q. And you have his approval in the minutes?

A. Yes.

Q. Do you have a copy of the resolution of October 2, [6] 1944, there? A. Yes, I have one.

Q. Mr. Knarr, can you tell me whether this resolution which you have handed me and stating at the end to have been adopted by the Executive Committee of the War Damage Corporation on October 2, 1944, was, in fact, adopted by the Executive Committee of the War Damage Corporation?

Mr. Henry: Just a moment. I will object to the question on the ground that it calls for a conclusion of the witness, it is leading, and is not the best evidence.

Those objections are made in addition to the running objection to which, I understand, Mr. Charles, you have so kindly stipulated, which go to the entire line of questioning here.

Mr. Charles: I will withdraw my question.

Q. (By Mr. Charles): Mr. Knarr, can you tell me whether any resolution having to do with scope of protection to be extended by the War Damage Corporation was passed by its Executive Committee on or about October 2, 1944? A. It was.

(Deposition of Matthias W. Knarr.)

Q. I will ask you whether this resolution which you handed to me and which bears the date at the end October 2, 1944, is a true copy of the resolution passed by the Executive Committee on that date.

Mr. Henry: The same objection as not being the best evidence.

In my judgment, Mr. Charles, the minutes of the meeting should be produced.

The Witness: It is.

Q. (By Mr. Charles): Mr. Knarr, could you show us the minutes of the meeting of April 2, 1944?

(A document was produced by the witness.)

Q. (By Mr. Charles): You have shown what purports to be a minute book of the War Damage Corporation, and you have shown us what appears to be the minutes of the meeting of the Executive Committee of the War Damage Corporation dated October 2, 1944, beginning at page 242 of this book, and running to page 247.

Mr. Knarr, can you state whether these are the minutes of the Executive Committee of the War Damage Corporation for that meeting?

A. That is a carbon copy. I can get you the original copy, if you wish. This is a working copy for index purposes.

Q. Could you get the original, please?

A. Yes, sir.

(The original of the document above referred to was produced by Mr. Knarr.) [8]

(Deposition of Matthias W. Knarr.)

Q. (By Mr. Charles): These minutes which you have just shown us are of the meeting of the Executive Committee of the War Damage Corporation, pages 242 through 247, inclusive, and are the original minutes of the corporation for the meeting of that date? A. They are.

Q. And this signature at the end is your signature, is it not? A. It is my signature.

Q. And the seal is the seal of the corporation?

A. It is the seal of the corporation.

Mr. Henry: If you have in mind offering those minutes, I will be perfectly willing to stipulate that a photostatic copy of that can be substituted for the originals, subject, of course, to the other objections as to the propriety of the offer.

Mr. Charles: Would you want a photostatic copy rather than a verified copy in this form?

Mr. Henry: That mimeographed document that is attached as an exhibit to your answer is simply the resolution and does not contain the discussions concerning the adoption of the resolution which appears in the minutes.

Mr. Charles: We offer in evidence a photostatic copy of the minutes of the corporation of October 2, 1944, and [9] will ask Mr. Knarr if we may be supplied with a photostatic copy.

The Witness: Yes, sir.

(The photostatic copy of the resolution of October 2, 1944, was marked as Defendant's Exhibit 4, for identification.)

(Deposition of Matthias W. Knarr.)

Mr. Henry: I wonder if you could arrange also to have an extra photostatic copy supplied to the reporter so that I would have one attached to my copy of the deposition.

Mr. Charles: Could we have one for the original and one for Mr. Henry's copy and one for our copy?

The Witness: As many as you like.

Mr. Charles: I think perhaps one extra copy would help, just in case we need it.

Q. (By Mr. Charles): The resolution, a copy of which you handed me, was passed by the Executive Committee as shown in the original minutes of October 2, 1944; is that correct?

A. That is correct.

Q. May I ask you whether the minutes of the Executive Committee just referred to were approved by the Board of Directors of the War Damage Corporation?

A. Yes, sir; they were.

Q. When were they approved?

A. On October 13, 1944.

Q. Can you tell us, Mr. Knarr, whether this resolution [10] of October 2, 1944, is still in full force and effect?

A. It is still in full force and effect.

Q. Was that resolution approved by the Secretary of Commerce?

A. It was approved by the Secretary of Commerce.

(Thereupon there was discussion off the record.)

(Deposition of Matthias W. Knarr.)

Q. (By Mr. Charles): I will show you, Mr. Knarr, a document dated December 30, 1942, carrying the designation RFC-1718, and I will ask you if this document was approved by the War Damage Corporation?

A. Yes, sir; it was approved by the War Damage Corporation on December 22, 1942.

Mr. Charles: I will ask that the document referred to be marked as Defendant's Exhibit 5 for identification.

(The document entitled RFC-1718, was marked as Defendant's Exhibit No. 5 for identification.)

Q. (By Mr. Charles): On what date was this Defendant's Exhibit No. 5 for identification, to which I have just referred, approved?

A. On December 22, 1942.

Q. And that appears in the minutes of the Executive Committee, does it?

A. Yes, of the Executive Committee's meeting on December 22, 1942. [11]

Mr. Henry: Mr. Charles, to save time, and to save you the expense and difficulty of producing the actual minutes of December 22, 1942, reserving all my other objections, if that is agreeable——

Mr. Charles: Yes.

Mr. Henry: ——I would suggest that you may be willing to stipulate that the only reference to this press release is in these minutes, and is a state-

(Deposition of Matthias W. Knarr.)

ment "The Executive Committee approved the following press release by the Secretary of Commerce" and then appears in quotations the minutes of December 22, 1942, the text of the press release as shown in Defendant's Exhibit No. 5, and that is the only discussion or reference to that press release that appears in those minutes.

Mr. Charles: That is correct. We will so stipulate, and we will offer in evidence Exhibit No. 5, which is the press release.

Q. (By Mr. Charles): I want to ask you, Mr. Knarr, whether the minutes of the Executive Committee of December 22, 1942, to which you just referred, were approved by the Board of Directors of the War Damage Corporation and, if so, on what date?

A. They were approved on April 9, 1943.

Mr. Henry: Again, to save time and the necessity, reserving my other objections, Mr. Charles, of your putting [12] in the full text of the minutes, the approval of the minutes by the Board of Directors which contains the text only as follows:

"The minutes of the meeting of the Board of Directors of December 9, 1942, and the minutes of the meetings of the Executive Committee of December 11, 12, 15, 16, 18, 22, 23, 29, 31, 1942."

and then some other dates after that appearing on through the last one of April 7, 1943, "were approved."

(Deposition of Matthias W. Knarr.)

That is the only reference with respect to the subject matter here.

In other words, there was no discussion, but merely the statement that they were approved?

Mr. Charles: That is correct, and it is so stipulated.

Mr. Henry: I will ask, Mr. Charles, if I may at this time, that the same stipulation will run to the approval, if I missed a particular reference, of the minutes of the Executive Committee of October 2, 1944, contained in the minutes of the Board of Directors and is merely the reference to meetings held on October 2, 1944, by the Executive Committee and approval of those minutes without any other discussion or text.

Mr. Charles: That is correct.

Q. (By Mr. Charles): Mr. Knarr, can you state whether or not the release [13] of December 30, 1942, has been rescinded or modified by the War Damage Corporation?

A. I have no recollection that it has been rescinded or modified.

Q. And if it has been rescinded or modified, would you have any record of it?

A. Yes, I would.

Q. Mr. Knarr, could you tell us whether the charter of the War Damage Corporation has at any time been amended? If so, when, and by what amendments?

A. It was amended as of March 30, 1942.

(Deposition of Matthias W. Knarr.)

Q. And that was the time when the name of the corporation was changed from War Insurance Corporation, to War Damage Corporation, was it?

A. That is correct, and the amendment called for the fact that the name of the corporation shall be War Damage Corporation.

Q. Do you have a copy of that amendment?

A. I have a copy of the amendment here. It is further amended with respect to objects, purposes, and powers of the corporation.

Mr. Henry: I will object to the question as calling for a conclusion of the witness, and move that the answer be stricken; also that the best evidence is the charter, and the amendments themselves. [14]

Q. (By Mr. Charles): Mr. Knarr, the original charter of the War Damage Corporation was filed where?

A. The original charter was filed with the Federal Register.

Q. Are the amendments to the charter so filed, too?

A. The amendments to the charter are filed with and published in the Federal Register.

Q. Could you give us the dates of all amendments to the charter of the War Damage Corporation? That is, the dates when they were published in the Federal Register?

A. Yes, I could. The amendment of March 30, 1942, is published in the Federal Register of April 2, 1942, page 2531. That is identified as Volume 7, No. 64.

(Deposition of Matthias W. Knarr.)

Q. Was there any further amendment to the charter of the War Damage Corporation?

A. It was further amended on January 15, 1947. That appears in the Federal Register of January 21, 1947, at page 407.

Q. Could you tell us with what that amendment to the charter was concerned?

A. Yes. It amends paragraph 7 to read that the Corporation shall not have succession beyond January 22, 1947, except for purposes of liquidation (including the adjustment and payment, not later than June 30, 1947, of claims [15] duly presented under subsection (b) of Section 5g of the Reconstruction Finance Corporation Act, as amended).

Q. Are those the only two amendments to the charter?

A. They are the only two amendments to the charter.

Q. There are no others? A. No.

Mr. Henry: What is the volume reference of that, Mr. Knarr?

The Witness: Volume 12, No. 14.

Q. (By Mr. Charles): Mr. Knarr, may I ask you whether any form of policy was adopted by the War Damage Corporation?

A. Yes, there was a form of policy adopted by us.

Q. I show you what purports to be a WDC form No. 1, which appears on pages 13, 14 and 15 of Defendant's Exhibit 1, and ask you whether that is a

(Deposition of Matthias W. Knarr.)

true copy of the form of the policy adopted by the War Damage Corporation.

A. It is a true copy of the policy.

Q. Mr. Knarr, can you tell us what the relationship of War Damage Corporation is to the Reconstruction Finance Corporation and to the United States?

A. It was created by the Reconstruction Finance Corporation pursuant to law, and it is an instrumentality of the United States.

Q. Does it have any capital stock? [16]

A. It does.

Q. Who owns the capital stock?

A. The Reconstruction Finance Corporation.

Q. Does the Reconstruction Finance Corporation own all the stock?

A. It owns all the stock.

Q. Do you know whether Mr. Jesse Jones was Secretary of Commerce during all of the year 1941 and 1942?

A. He was Secretary of Commerce and he was appointed, according to the Congressional Directory, as Secretary of Commerce on September 19, 1940.

Q. And he continued to act as Secretary until about when? Was it in 1945?

A. He was succeeded as Secretary of Commerce by Mr. Wallace who, according to the Congressional Directory, entered on duty as Secretary of Commerce on March 2, 1945.

Mr. Charles: I think that is all.

(Deposition of Matthias W. Knarr.)

Cross-Examination

By Mr. Henry:

Q. Mr. Knarr, I wonder if we may refer to Defendant's Exhibit 4, a copy of which you have. That is the resolution of October 2, is it? A. Yes.

Q. I refer to the meeting's minutes.

With reference to Defendant's Exhibit 4, the minutes [17] of a meeting of the Executive Committee of the War Damage Corporation held on October 2, 1944, were you personally present at that meeting? A. I was.

Q. And throughout the entire period of that meeting? A. Yes.

Q. You will note in the minutes of that meeting appears the following statement on page 243?

“Mr. Klossner stated that a question recently had been raised by a claimant as to whether this Corporation might be under legal obligation to make compensation for the hulls, equipment, and cargoes of vessels lost by enemy attack while en route between ports of the United States and foreign ports, if such vessels were destroyed within three miles of the shores of the United States.”

I will ask you if you know who the claimant was that was referred to, and the subject of that statement that I have just read.

A. I don't know who the claimant was.

Q. As far as you know, that was the only claim at that time for compensation for cargo on a foreign voyage; is that correct?

(Deposition of Matthias W. Knarr.)

A. I could not answer that question.

Q. Do you know of any claim for compensation for the [18] hull of a vessel, or the vessel itself?

A. I could not answer that, Mr. Henry. Other people in the corporation were handling claim matters.

Q. You had nothing at all to do with the policy that was decided upon as embodied in this meeting and resolution that I have just referred to?

A. No, sir.

Q. Do you know whether in the minutes of any other meeting, of either the Executive Committee or the Board of Directors of the War Damage Corporation there is any reference to claims by the owners of vessels lost prior to July 1, 1942, by enemy action, which vessels were in transit on en route between American ports?

A. Do I know of any references in the minutes?

Q. That is right.

A. I would have to look that up. I could not say offhand.

Q. Do you have any independent recollection of any such discussion that occurred at a meeting either of the Executive Committee or the Board of Directors of the War Damage Corporation?

A. Again, I would have to look up the record.

Q. I am simply asking whether you have any recollection.

A. No, sir. [19]

Q. Do you recall addressing a letter under date of January 19, 1945, to the Matson Navigation Com-

(Deposition of Matthias W. Knarr.)

pany, under your signature, Mr. Knarr, relating to the claim for the loss of the steamship Lahaina?

A. I would have to refer to the record.

Q. You have no independent recollection of having sent such a letter? A. No, sir.

Q. I wonder if we may see the minutes of the War Damage Corporation's Executive Committee and Board of Directors for the period from December 29, 1944, to January 19, 1945.

(The documents referred to were produced by the witness.)

Q. (By Mr. Henry): Mr. Knarr, the Regulations A, Defendant's Exhibit 1, effective July 1, 1942, have no reference at all to the losses that might have occurred between December 6, 1941, and midnight of June 30, 1942; is that correct?

Mr. Charles: I object to the question on the grounds it is not clear. It does not appear from the question as to whether the question seeks the witness to state whether anything in the Regulation itself states what is applicable, or whether the question asks for the witness's own knowledge as to the applicability of regulations, aside from what [20] appears in that document.

Mr. Henry: The witness can only testify as to what he himself knows, Mr. Charles, so I submit that the question is clear and I will ask for an answer.

The Witness: The Regulations A relate to the insurance program which went into effect on July 1, 1942.

(Deposition of Matthias W. Knarr.)

Q. (By Mr. Henry): In other words, it does not relate in any way to the so-called free insurance period prior to July 1, 1942?

A. It relates to the program of insurance that went into effect on July 1, 1942.

That is the program of insurance.

Q. That was on insurance policies issued and premiums paid?

A. Yes. That was insurance for policies issued and premiums paid.

Q. And that is true, also, is it not, of these amendments, Exhibits 2 and 3 to Regulations A?

A. Yes.

Q. In other words, it related to the period after July 1, 1942, for the insurance program under policies issued and premiums to be paid?

A. Yes.

Q. No policies of insurance were issued to cover any losses prior to July 1, 1942; is that correct?

A. That is correct.

Q. That is, no written policy was ever issued for any of those losses that may have occurred in that period prior to July 1, 1942?

A. That is correct.

Q. What is the capital of the War Damage Corporation?

A. I would have to refer to the record. The total authorized capital stock of the corporation shall be \$100 million. That is pursuant to the charter, paragraph 6.

Q. Was that ever amended?

A. That was never amended.

(Deposition of Matthias W. Knarr.)

Q. Yet, under the amendment to the Reconstruction Finance Corporation Act, the so-called Section 5g adopted in March of 1942, the funds to be supplied or that might be supplied to the War Damage Corporation were increased within the authorization to \$1 billion. Is that correct?

A. I think the law would speak for itself there.

Mr. Henry: I assume you will so stipulate and save the necessity of having the witness answer?

Mr. Charles: Yes. I will stipulate that the statute will speak for itself.

Q. (By Mr. Henry): Mr. Knarr, approximately how much in premiums for the period following July 1, 1942, was collected by the War Damage Corporation?

Mr. Charles: I object to the question on the grounds it [22] is incompetent, irrelevant, immaterial, and does not relate to any of the issues in the case.

The Witness: I do not have the record here. The Treasurer maintains the records relating to premiums received.

Q. (By Mr. Henry): Is it correct, Mr. Knarr, that there is approximately \$200 million of surplus at the present time of premiums received over losses and expenses paid by the War Damage Corporation?

Mr. Charles: The same objection.

The Witness: The Secretary keeps no records. The Treasurer keeps the records and I could not answer that question.

(Deposition of Matthias W. Knarr.)

Q. (By Mr. Henry): Are you familiar with any suits that are pending against the War Damage Corporation?

A. I am not familiar with them.

Q. You do not know of any suit that has been brought by former policyholders to require a refund of some approximately \$200 million of excess funds from premiums received?

Mr. Charles: The same objection.

The Witness: The General Counsel would have to answer that.

Q. (By Mr. Henry): You have no knowledge at all? [23]

A. That is a matter that does not come within the purview of the Secretary's Office.

Q. You have no knowledge at all of such a suit?

A. I think I have seen papers to that effect.

Q. Do you have a copy of the by-laws of the War Damage Corporation? A. Yes, sir.

Q. I wonder if I might see those.

(The witness produced the by-laws of the War Damage Corporation.)

Q. (By Mr. Henry): Are there any amendments to these by-laws?

A. I don't think so, but I will have to check that.

Q. Mr. Knarr, you have submitted to me what purports to be copies of the minutes of the Reconstruction Finance Corporation, containing the text of the by-laws adopted by the War Damage Corporation. Such by-laws are as originally adopted on

(Deposition of Matthias W. Knarr.)

December 13, 1941, with the exception of an amendment adopted on May 21, 1946, which related only to the amendment of Section 14 of the original by-laws, changing to a fiscal year from a calendar year, that is, going from July 1 to June 30 of each year?

A. That is correct.

Q. I wonder, Mr. Knarr, if you would be kind enough to furnish to me, or to Mr. Charles, a copy of those by-laws [24] as appear beginning on page 637 and ending on page 641 of this minute book which you have handed me.

A. Yes, sir.

Q. That is, paragraphs 1 through 20, inclusive, which constitute the by-laws?

A. All right.

Mr. Henry: That is all.

Redirect Examination

By Mr. Charles:

Q. Mr. Henry asked you, I believe, if you had written a letter dated January 19, 1945, to Matson Navigation Company declining its claim. I should like to refer you to the minutes of January 19, 1945, of the Executive Committee of the War Damage Corporation and ask you whether you were authorized to send a letter declining the claim to Mr. Melvin Price, Matson Navigation Company, 215 Market Street, San Francisco, California?

A. On that date they did authorize me to send a letter to Matson Navigation Company at 215 Market Street, San Francisco.

Q. Would you be good enough to read that letter?

(Deposition of Matthias W. Knarr.)

Mr. Henry: I will stipulate only that the letter is a copy of the same text or has the same text as is attached to the complaint of Matson Navigation Company in this action.

Mr. Charles: That will be sufficient. [25]

Mr. Henry: I suppose I could carry that stipulation a little further than in these minutes to which you have referred of the Executive Committee of the War Damage Corporation for January 19, 1945, the only text relating to this letter is the text of the letter itself, and the following statement appearing on the minutes immediately preceding the text of the letter:

“The Executive Committee authorized the Secretary to send the following letters”——

And then appears the letter that was authorized, the one addressed to Mr. Price, and then a number of other letters, two of them, to other people, having no bearing or reference to the subject in litigation here?

Mr. Charles: That is correct. We will stipulate to that.

Q. (By Mr. Charles): Do you know, Mr. Knarr, what if any publications were given to the release dated December 30, 1942, which is Defendant's Exhibit No. 5?

A. What publicity was given to it?

Q. Yes.

A. It was released to the press and carried by the press or those who might publish it.

Mr. Charles: I think that is all. [26]

(Deposition of Matthias W. Knarr.)

Recross-Examination

By Mr. Henry:

Q. In connection with Mr. Charles' last question, Mr. Knarr, you have no knowledge of how extensively this press release was actually reprinted or published by the press, do you?

A. I would have no knowledge of that.

Q. As far as you know, there was no action taken with respect to that press release other than to release it to the press; is that correct?

A. That is correct.

Mr. Henry: I think that is all.

Mr. Charles: I believe that is all.

/s/ MATTHIAS W. KNARR.

Subscribed and sworn to before me this 28th day
day March, A.D. 1947.

[Seal] /s/ LLOYD L. HARKINS,

Notary Public in and for the
District of Columbia.

My commission expires August 14, 1947. 27]

ROBERT C. GOODALE

a witness of lawful age, was thereupon duly sworn
and, being examined by counsel, testified as follows:

Direct Examination

By Mr. Charles:

Q. Will you state your name for the record,
please? A. Robert C. Goodale.

(Deposition of Robert C. Goodale.)

Q. Mr. Goodale, are you an officer of the War Damage Corporation? A. Yes.

Q. Are you General Counsel? A. Yes.

Q. Can you tell us when you were first occupied with any of the affairs of the War Damage Corporation? A. Almost from its inception.

Q. Can you tell us about when you became Assistant General Counsel of the War Damage Corporation?

A. I became Assistant General Counsel about the beginning of the year 1943.

Q. But prior to that date you have been with the Reconstruction Finance Corporation?

A. Before that time and throughout the entire period of the organization of the War Damage Corporation, I was one of the counsel for the Reconstruction Finance Corporation, of which the War Damage Corporation is a subsidiary. A part [28] of my duties as counsel for the Reconstruction Finance Corporation was, on request, to assist in work of the War Damage Corporation.

Perhaps I should make that more clear if I mentioned that the War Damage Corporation has had, throughout its existence, very few, if any, full time employees, possibly two or three.

I do not know that there have been that many, but its work has been done almost entirely by borrowing the employees of the Reconstruction Finance Corporation.

Q. Mr. Goodale, are you familiar with the administration of the War Damage Corporation?

A. Yes.

(Deposition of Robert C. Goodale.)

Q. Are you familiar with the legislative history of the War Damage Corporation?

A. Reasonably so, yes.

Q. Are you familiar with the regulations passed by the War Damage Corporation? A. I am.

Q. Do you have access to the records and files of the War Damage Corporation? A. I do.

Q. Are you familiar with the administration of the Act from the organization of the corporation to the present day? [29] A. Yes.

Q. Can you tell us whether, as General Counsel, you have anything to do with the payment of claims under the Act?

A. I do. All claims that are submitted to the Board contain a recommendation from the Legal Division as to payment. That recommendation may be made by me or an Assistant General Counsel.

Q. Do you have one or more assistants who help you in connection with this work?

A. There is an assistant general counsel, a Mr. Woolman, who does a part of the work. There is frequent consultation between us.

Q. Are you familiar with the action which the corporation has taken with reference to allowing or disallowing claims of different types of property?

Mr. Henry: I object to the question as calling for a conclusion of the witness, is incompetent, irrelevant, and immaterial, and not the best evidence.

Q. (By Mr. Charles): Are questions concerning the payment or nonpayment of claims submitted to you for your recommendation? A. Yes.

(Deposition of Robert C. Goodale.)

Q. Is that so with respect to claims arising under the free protection provisions of the statute, namely, subdivision (b) as well as under the insurance program of the statute, [30] subdivision (a)?

A. Yes.

Perhaps I should make this clarification: That with respect to the claims under policies of insurance, there is a provision in the regulations for the War Damage Corporation for making payment without papers being forwarded to Washington in cases in which there appear to be no legal questions.

Q. Have you been, as General Counsel, supervising this litigation on behalf of the War Damage Corporation with which we are concerned here?

That is, the suits brought by the Matson Navigation Company against the War Damage Corporation?
A. In a general way, yes.

Q. Can you tell us approximately what time the first claim under subdivision (b) of Section 5-G of the Reconstruction Finance Corporation Act was paid or adjusted?
A. In February, 1943.

Mr. Henry: I object to the question as incompetent, irrelevant, and immaterial, having no bearing on the issues in this case.

The Witness: Shall I answer that?

Mr. Charles: Yes.

The Witness: In February, 1943.

Q. (By Mr. Charles): Do you know whether the War Damage Corporation has [31] excluded any types of property from the coverage otherwise provided for by Section 5-G of the Reconstruction Finance Corporation Act?

(Deposition of Robert C. Goodale.)

Mr. Henry: I object to the question as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, and not within any of the issues of this case; and, furthermore, as calling for a self-serving declaration, and is an interpretation which is for the courts to decide under the statute.

The Witness: Do you want an answer?

Mr. Charles: I will ask another question.

Would you read the question back, Mr. Reporter?

(The pending question, as heretofore recorded, was thereupon read by the reporter.)

The Witness: Yes, it has.

Q. (By Mr. Charles): Mr. Goodale, are you familiar with the Regulations A adopted by War Damage Corporation? A. Yes.

Q. Can you tell us to what extent, if any, those regulations were followed with respect to claims arising under subdivision (b) of Section 5-G, relating to the free protection provisions?

Mr. Henry: In order to avoid any unnecessary delays, will you stipulate that my objections run through the entire [32] line of questioning which you are putting here, relating to the action by Mr. Goodale or the War Damage Corporation and on other matters or other attempts to construe the statute?

Mr. Charles: Yes. The objections which you have made may be deemed to go to all questions, except, of course, as to form.

(Deposition of Robert C. Goodale.)

Mr. Henry: I make the objection for the double purpose. While the objections are reserved, nevertheless, the question may be considered in its form as calling for the conclusion of the witness and calling for matters as I have mentioned in my preceding objections and are incompetent, irrelevant and immaterial, and not within the issues of this case, and are attempts to call for the conclusion of the witness.

I want to be sure that as far as the form of the question is concerned, I would not be foreclosed in any way.

Mr. Charles: The only thing I want to make certain is that any objections that go to the form can be cured if I knew what the nature of the objection was that would be made.

Mr. Henry: The objections as to form, as far as the questions being leading, of course, I will be foreclosed on the leading character of the questions.

If you would prefer, I will raise the objections and probably it will not take much longer so that there will not be any misunderstanding.

Mr. Charles: I think it would be preferable if you would [33] raise the objections that may relate to the form of the questions so that I could take the precaution of curing the objection.

Mr. Henry: All right, then.

(The pending question, as heretofore recorded, was thereupon read by the reporter.)

The Witness: They were followed.

(Deposition of Robert C. Goodale.)

The only exception that I recall related to the protection for cargoes at sea, where the protection was extended under the free program to such cargoes en route between ports situated in the United States or its possessions.

Q. (By Mr. Charles): Do you know why that exception was made?

Mr. Henry: I object to the question as calling for a conclusion of the witness.

The Witness: Yes.

Q. (By Mr. Charles): Would you state what that reason was?

Mr. Henry: Same objection.

The Witness: Because it was universally concluded that the legislative history of the Act and the language of the Act together indicated Congressional intention that free protection should extend to goods in transit.

It was not believed that Congressional intent was that such protection should be extended to hulls during the free [34] period.

Q. (By Mr. Charles): Can you state whether the corporation excluded any types of property other than the hulls of ships from its protection granted under Section 5-G(b)?

A. It excluded many other types of property.

Q. Could you give us an illustration of some of those other types of property?

A. Currency, curiosity, antiques, and also furs and jewelry of a value together in excess of \$1,000 on any one claim. Those were some of the main ones. There were many others.

(Deposition of Robert C. Goodale.)

Q. And the corporation adopted a resolution, did it not, on October 2, 1944, excluding certain types of coverage from the protection of subdivision (b) of the Act relating to free protection?

Mr. Henry: I object to the question as calling for a conclusion of the witness and not the best evidence.

Furthermore, it calls for a self-serving declaration as to a matter that was adopted some two years and nine or eleven months after the loss in question here, and have no retroactive effect upon the claims by Matson Navigation Company in this proceeding.

The Witness: It did. [35]

Q. (By Mr. Charles): Can you tell us, if you know, what the purpose of the corporation was in the adoption of that resolution?

Mr. Henry: I object to the question as calling for a conclusion of the witness; it is speculation, not the best evidence, and it is not within the issues of this case and calls for a self-serving declaration.

The Witness: The resolution was almost wholly declaratory of a practice that had existed from the commencement of the activity of the corporation. Its purpose was mainly to place of record and formalize the action we had already carried into effect in the actual day-to-day administration of the Act.

Q. (By Mr. Charles): Can you tell us whether, in the handling of the claims under section (b) of the Act the corporation conformed to the pro-

(Deposition of Robert C. Goodale.)

visions of that resolution of October 2, 1944, which was offered in evidence in connection with another deposition taken today, that of the Secretary, Mr. Knarr?

Mr. Henry: Object to the question as calling for a conclusion of the witness; it is incompetent, irrelevant, and immaterial, and calls for a self-serving declaration.

The Witness: It did.

Q. (By Mr. Charles): Are you familiar with the practices that have been [36] followed by the War Damage Corporation in the adjusting and payment of claims under the free protection provisions of the Act? A. Yes, I am.

Q. Can you state whether certain types of property have been constantly excluded by the corporation from the free protection provisions of the Act?

Mr. Henry: I object to the question as calling for a conclusion of the witness and not the best evidence, and calling for a self-serving declaration and is incompetent, irrelevant, and immaterial.

The Witness: They have been.

Q. (By Mr. Charles): Can you state the types of property that are excluded by the resolution of October 2, 1944, which were in practice excluded prior to the adoption of the resolution? [37]

Mr. Henry: I object to the question as calling for a conclusion of the witness, calling for a self-serving declaration, and is incompetent, irrelevant and immaterial.

(Deposition of Robert C. Goodale.)

The Witness: They were, to the best of our ability. Of course, in the practical administration of the free program, it is inevitable that situations arise in which it is difficult to draw a line.

For example, what is a curiosity?

Or sometimes there is a question as to whether shell ornaments are a useful article and should be paid for, or whether they are a curiosity. There may have been instances in which adjusters have had diverse opinions on borderline cases of that sort.

Aside from that, there has been, to the best of our ability, a completely uniform exclusion in practice of all classes of property that were excluded by the resolution of October 2, 1944.

Q. (By Mr. Charles): Is that uniform exclusion continued to the present day?

A. It has continued to the present day and is in effect at this time. It is a matter of daily application.

Q. Can you state, Mr. Goodale, whether any claims for loss of ships have been paid at any time by the War Damage Corporation? [38]

A. None have been.

Q. Would it be correct to say that no claims for loss of ships have been paid under the free protection provisions of the Act?

A. That is correct.

Q. Can you tell us how many claims, if any, have been made for the loss of ships against War Dam-

(Deposition of Robert C. Goodale.)

age Corporation, what those claims were, and what, if any, disposition has been made of those claims?

A. Three such claims have been made. Two on the West Coast and one on the East Coast.

The first claim presented on the West Coast was the claim of the Union Oil Company for the loss of the ship Montebello. That claim was denied by the Board. Subsequently suit was brought, the case was tried in San Francisco and the verdict for the defendant was rendered by the jury.

The other case on the West Coast is the case now at bar, in which this deposition is being taken.

The only other ship case and the only ship claim presented on the East Coast was the claim of the owner of the schooner Aeolus. That claim was denied.

Q. Have any claims on ships been paid by the War Damage Corporation? A. No.

Q. Do you know at the time of the resolution of October [39] 2, 1944, was adopted, the corporation had received a claim from the Matson Navigation Company for the loss of the Lahaina?

A. It had not, so far as I know, and I think I would know from the files if we had received it.

Q. Do you know whether the War Damage Corporation has at any time in the administration of the Act conferred with insurance experts—that is, men experienced in the field of insurance?

A. It has, regularly and systematically.

Q. Do you know whether there was any such conferring prior to the time when the Act was

(Deposition of Robert C. Goodale.)

adopted? That is, Section 5-G of the Reconstruction Finance Corporation Act?

Mr. Henry: I object to the question as calling for hearsay; not the best evidence, the time, place and action are not fixed—the question is vague and indefinite and calls for self-serving declaration and an attempt to invade the province of the Court, which is the only forum that could construe the statute.

The Witness: I know that it has, and before that date the officials of the Reconstruction Finance Corporation did so confer.

Q. (By Mr. Charles): Do you know whether any insurance experts conferred or advised with the corporation in connection with the drafting of the Regulations A? [40]

Mr. Henry: The same objection, Mr. Charles.

The Witness: Regulations A was discussed in detail, line by line, at a meeting somewhat before July 1, 1942. At that meeting there were present a considerable number of men from the insurance industry, possibly half a dozen or more, including Mr. Hurd and Mr. Christensen.

Q. Where did that meeting take place?

A. Both of those men are officials of the War Damage Corporation, and that meeting took place here in the Reconstruction Finance Corporation building in Washington, D. C.

Q. Can you tell us whether the War Damage Corporation officials made any interpretation of the terms "property in transit" as they appear in the statute?

(Deposition of Robert C. Goodale.)

Mr. Henry: I object to the question as calling for a conclusion of the witness, a self-serving declaration, not within the proper province of any witness to invade the province of the court. The statute is clear and if there is any question of statutory construction, it is for the Court and not for the witness to determine.

The Witness: It has been considered to apply to cargo and also to personal effects of passengers not carried as cargo or under a bill of lading. Also, to shipments by mail or otherwise on vessels that was not entered as cargo. [41]

Q. (By Mr. Charles): Do you, as counsel, have anything to do with the advising of the Board of Directors of the War Damage Corporation concerning the meaning of the words "property in transit"?

Mr. Henry: I object to the question on the grounds previously stated, unless you want me to repeat it, Mr. Charles.

Mr. Charles: It is not necessary.

The Witness: I had occasion to, from time to time.

Q. (By Mr. Charles): Did you take into account, in advising on the meaning of the words "property in transit" the legislative history of Section 5-G?

A. Yes.

Q. Could you tell us, Mr. Goodale, whether the War Damage Corporation has paid subrogated claims of insurance companies?

A. It has not.

(Deposition of Robert C. Goodale.)

Q. Can you tell us whether it has at any time received claims of insurance companies under the free protection provisions of the Act?

A. Such claims have been either presented directly by the insurance companies or by other claimants with knowledge on the part of the War Damage Corporation that only relate to the claims being presented for the benefit of the insurance companies. [42]

Q. Has the corporation denied all such claims?

A. It has.

Q. Do you know, Mr. Goodale, whether the proponents of the bill which became Section 5-G of the Reconstruction Finance Corporation Act had any connection with the War Damage Corporation, and if so, what that connection was?

Mr. Henry: I object to the question as incompetent, irrelevant, and immaterial, calling for hearsay, and calling for a self-serving declaration and an attempt to invade the province of the Court.

The Witness: The report on Section 5-G of the bill which was sent to the Senate was prefaced by the spokesman for the Senate Committee with a statement that he understood the bill had been suggested by Mr. Jones. That is my understanding of it.

Q. (By Mr. Charles): Did you have any first-hand knowledge as to whether Mr. Jones had any association at that time with the Reconstruction Finance Corporation? A. Yes, I did.

(Deposition of Robert C. Goodale.)

Q. Can you tell us, Mr. Goodale, whether the corporation, in paying claims, has paid the full market value of property or has, in any situation, adopted any different standard?

Mr. Henry: I object to the question as calling for a [43] self-serving declaration and incompetent, irrelevant, and immaterial.

The Witness: It has, in some classes of cases, adopted different standards.

Q. (By Mr. Charles): Can you tell us what amounts have been paid in connection with the loss of jewelry under the free protection provisions of the statute?

A. Such claims have been limited to amounts not in excess of \$1,000 for jewelry and furs of the same claimant. Very few, if any, claims have been asserted for jewelry in the amount of \$1,000, and I cannot say with certainty without a special check of the records whether there have been instances in which the \$1,000 limitation on jewelry came into effect on the free provision.

Q. Was there such a limitation as \$1,000 on policies issued by the War Damage Corporation under Section (a)?

A. There was a limitation that unless specifically described in the policy, jewelry and furs would not be covered in an amount in excess of \$1,000 for both categories, and that same rule has been consistently considered as applicable to free compensation.

(Deposition of Robert C. Goodale.)

However, there has been a very careful check of all claims for jewelry, primarily as a precaution against possible fraud or imposition, and there have been very few instances [44] in which claims for jewelry were made in an amount that would bring the \$1,000 limitation into effect.

Q. Do you know whether the corporation has paid the full market value on claims for loss of merchandise under the "in transit" provision of Section 5-G?

A. It has not followed the policy of paying the full market value of such property. It has adopted the recommendation of its Marine adjusters, which is the basis of paying the amount not in excess of the cost of such property to the owner making the claim.

In other words, if a claim was made by a manufacturer for goods shipped to his customer, the manufacturer would be allowed only the cost of the goods, even though that might be only half of the sale value.

Q. Do you know whether the corporation has at any time taken into consideration, in the consideration or adjustment of a loss, the extent to which the claimant may have received the benefit through taking of a tax deduction?

Mr. Henry: I object to the question as incompetent, irrelevant, and immaterial, calling for a self-serving declaration, and not within the issues of this case.

(Deposition of Robert C. Goodale.)

The Witness: Our adjusters have recommended that any such tax deductions be taken into account and the Board has, in connection with the only claim of a corporation that has come up to my knowledge since the repeal of the excess profits [45] tax, announced to the claimant that the amount allowed, if any, would not exceed the loss, with appropriate allowance for any benefits received by reason of the loss under the excess profits tax law.

That was action by the Board of Directors.

Mr. Charles: I think that is all.

Cross-Examination

By Mr. Henry:

Q. Mr. Goodale, if I understand correctly on the losses during the so-called free period that were paid for Marine property,—you mentioned cargo that was in transit—in your adjustment of these losses and final payments, am I correct in assuming that you were trying to make the property owner whole without giving him a profit on whatever transaction may have been involved?

A. We are attempting to apply the insurance principle, that insurance is intended to be limited to indemnity.

Q. So it was actual loss rather than a profit that you were willing to cover; is that correct?

A. Yes.

Q. There was not any arbitrary determination in connection with these Marine cargoes that you

(Deposition of Robert C. Goodale.)

paid, that you were not paying above a certain fixed amount in dollars? A. There was not.

Q. Yes. [46]

A. That is correct.

Q. So it differed from the policy that you had with respect to jewelry, or such items, that you were limiting it to \$1,000?

A. It is different from that.

Q. That was not involved in any way with such Marine losses as you did pay; is that correct?

A. Yes.

Q. You mentioned the Montebello case, Mr. Goodale. It is a fact, is it not, that the verdict of the jury in that case was determinative in favor of the War Damage Corporation as defendant, because of the fact which was established and found by the jury that the loss of the Montebello, that is, the torpedoing of the Montebello, occurred outside of the Continental United States; isn't that correct?

A. That is correct, sir, except your statement that that was found by the jury. I do not remember that it was in the special verdict. I remember only the general verdict in favor of the defendant.

Q. That was the only issue that was before the jury; isn't that correct? A. That is correct.

Q. The Montebello, unlike the Lahaina, was not traveling, or was not on a voyage, or the way I choose to word it, not "in transit" between American ports, or ports [47] of possessions of the United States? A. I believe it was not.

(Deposition of Robert C. Goodale.)

Q. May I refresh your recollection in that regard, that the Montebello was bound on a voyage from California to British Columbia?

A. My recollection is already perfectly clear on that point.

Q. You are familiar, are you not, with the briefs that were filed by the parties in that action?

A. Yes.

Q. Do you recall the contention being made in that action in the brief on behalf of the War Damage Corporation that the Montebello, being "in transit" between a California port and Vancouver, British Columbia, could therefore not come within the protection of property in transit?

Mr. Charles: I object to the question.

Mr. Henry: Under the wording of the Act, which is confined to property in transit between American ports or ports of American possessions?

Mr. Charles: I object to the question on the ground that it is purely argumentative, has nothing to do with the issues, is not proper cross-examination, and what may have been given by way of illustration in another brief has certainly no bearing on this case or any phase of it.

Mr. Henry: Will you instruct the witness not to answer? [48]

Mr. Charles: I have no objection to the witness answering if he happens to know what may have been said, but I reserve my objection.

Mr. Henry: Indeed.

(Deposition of Robert C. Goodale.)

The Witness: It is my impression that that question was raised in the briefs in that case.

Q. (By Mr. Henry): The reason, if there was a reason for restricting on jewelry or such other claims the amount that would be paid by the War Damage Corporation, was not because of any lack of funds available or in the War Damage Corporation to pay the full amount of such loss?

A. No.

Q. In other words, there have always been sufficient funds to cover the losses. Is that correct?

A. To cover the losses that have been presented other than Philippine losses. As to whether there were sufficient funds to cover losses in the Philippine Islands, which the War Damage Corporation was authorized pay under section 5-G, the Philippine War Damage Commission is now handling it, and that is another matter.

I am not so sure there were sufficient funds for that purpose.

Q. The policy, however, that was developed, as you testified with respect to more or less arbitrary limitation on the amount of recoveries was not because of any lack of [49] funds?

A. I think not.

Q. In the War Damage Corporation?

A. I think not.

Q. Incidentally, do you know what the present assets of the War Damage Corporation are?

A. Somewhere in the neighborhood of \$230 million dollars.

(Deposition of Robert C. Goodale.)

Q. And that represents largely the excess of premiums over the payment on losses?

Mr. Charles: I object to the question on the ground that it is immaterial to any of the issues of the case, and not proper cross-examination.

The Witness: Yes.

Q. (By Mr. Henry): It is a fact that there is on file in one of the District Courts of the United States at the present time an action against the War Damage Corporation to attempt, on behalf of the former policyholders or premium payers to recover and return to the public that participated in the coverage, this excess fund?

Mr. Charles: I want to object to that on the ground that it is incompetent, irrelevant, and immaterial, it has no bearing on any of the issues in the case. It has nothing to do with the interpretation of the statute. It is not proper cross-examination, and the only purpose that I can see [50] would be to prejudice the defendant's position.

The Witness: Two such actions are pending, both purporting to be brought in behalf of the former and present policyholders.

Q. (By Mr. Henry): Mr. Goodale, did you have any experience with Marine insurance prior to the adoption of the War Damage Corporation?

A. Yes.

Q. In what connection, please?

A. I tried two, possibly more, such suits, for the London Insurance Corporation on the West Coast.

(Deposition of Robert C. Goodale.)

In fact, that was many years before I came to the War Damage Corporation.

Q. Were you an admiralty attorney before you came with the War Damage Corporation?

Mr. Charles: I object to the question on the ground that it is argumentative, and irrelevant.

The Witness: Those were admiralty cases.

Q. (By Mr. Henry): Perhaps I am being a little presumptuous for what I refer to as the admiralty bar. I think that they are, in large part, attorneys who are without the real justification for the title that they give themselves. That is, members of the admiralty bar, but I am trying to determine from you [51] whether you had had any extensive experience with Marine insurance prior to the adoption of the War Damage Corporation Act.

A. I have never specialized mainly in Marine matters. I have handled such as came to me or to my firm that were assigned to me from time to time.

Q. As far as you can recall, there were two or three so-called Marine insurance cases that you had tried?

A. I recollect two or three that I tried and a considerable number of others in which we appeared for the insurer.

Q. What firm was that?

A. I was then a member of the firm of Bausman, Kelleher, Oldham & Goodale.

Q. When did you leave our very attractive West Coast?

A. When I went to the Presidio Training Camp in 1917 or 1918.

(Deposition of Robert C. Goodale.)

Q. And that was your last connection with any admiralty or any Marine insurance practice; is that correct?

A. I do not remember whether I had any Marine matters when I was in New York, or not.

Q. They would be somewhat incidental in connection with a general practice; is that correct?

A. Yes.

Q. Did you consult personally with any members of [52] Congress, that is, of the House of Representatives or members of the Senate in all the legislation and proposed legislation that ultimately was adopted under the War Damage Corporation Act?

A. Do you mean in advance of the adoption of the Act?

Q. Yes. A. No.

Q. You said that you were at least somewhat familiar with the legislative history of this amendment which we call the War Damage Corporation Act. A. I did.

Q. Mr. Goodale, in connection with that familiarity that you have, did it extend to a review of the proceedings on the floor of the House of Representatives or of the Senate as appears in the Congressional record? A. Yes.

Q. Are you familiar with the following statement appearing at page 2658 of the Congressional Record, Volume 88, Part 2, for the 77th Congress, Second Session:

“Mr. Smith of Ohio: Under the temporary arrangement until the contracts are written,

(Deposition of Robert C. Goodale.)

say, July 1, are the sinkings that are taking place at the present time covered by the temporary arrangement?

“Mr. Steagall: Yes.”

A. Yes. [53]

Q. Now, is it your understanding that this reference in this quotation that I have just made to the sinkings that are taking place would be sinkings of vessels in the course of the war which was then actively in progress? Is that correct?

A. I think it refers to the sinkings of cargo in transit between American points and points in American possessions.

Q. But not to the sinkings of the vessels itself?

A. Not for the protection of hulls.

Q. That is your interpretation of it; is that correct?

A. That is correct.

Q. Referring again to the Congressional Record in the proceedings on the floor of the House on March 2, 1942, at page 1847 of this same volume that I have referred to, I will ask you whether you are familiar with the following statement that appears in the record of the proceedings on that date:

“Mr. White: Does this war insurance corporation apply to cargoes and ships on the high seas?”

“Mr. Steagall: Yes, under certain conditions.”

Are you familiar with that statement?

A. Yes.

(Deposition of Robert C. Goodale.)

Q. Now, in the last quotation that I read, Mr. Goodale, Congressman White mentioned not only cargoes, but also ships. Do you contend that there was not in the mind of the Congressman [54] at time that it would cover anything except cargoes?

A. Have you read the next question and answer after that? I think you will understand it by the nature of the answer that was made. The substance of the answer was this:

The question was asked, "Did it cover cargoes and ships?" The man who was asked the question said, "Yes," and then he was asked another question, and he said, "I would like to make a further explanation of that," and for the explanation he referred his interrogator to a member of the committee in charge of Marine legislation.

In other words, he referred both the preceding question which you have just read, and the succeeding question which you have not read to a member more familiar than he with the true interpretation of Section 5-G in that record.

In answer to that reference, he got not a yes, but a no statement. He said that those sorts of losses would be taken care of by the Maritime Commission and not by the War Damage Corporation.

Q. Mr. Goodale, isn't it a fact that the reply for the other comment was made by Mr. Bland, who I assume is the gentleman to whom you referred as having a connection with the Merchant Marine and Fisheries Committee at that time was prospective

(Deposition of Robert C. Goodale.)

only with respect to what would be done not for the period prior to the colloquy on the floor of the House here, but for the period subsequent, if and when more [55] extended legislation for the Maritime Commission was adopted?

A. There is no such information in the Congressional Record.

Q. Let me read you this statement, Mr. Goodale, which follows the first statement made by Mr. Bland after this question and answer that I just read to you. The question was by Mr. White and the answer was by Mr. Steagall.

“Mr. Bland: Things like that are being taken care of under the War Insurance Bill, which was extended today. I have just put into the basket a report on the amendment to that bill which covered every phase of the Marine liability and risk.”

Mr. Charles: I want to object to that question on the ground that the legislative history speaks for itself; that this line of questioning is wholly argumentative and not proper cross-examination.

Mr. Henry: Do you instruct the witness not to answer?

Mr. Charles: No, I do not have to instruct my witness not to answer.

Mr. Henry: May I have an answer, please?

Do you want the question repeated?

The Witness: Yes.

(The pending question, as above recorded, was thereupon read by the reporter.) [56]

(Deposition of Robert C. Goodale.)

Q. (By Mr. Henry): Isn't it a fact, Mr. Goodale, that that statement that I have just read from Mr. Bland applies to legislation to be adopted rather than legislation that had been adopted?

A. That statement does, yes.

Mr. Charles: None of the legislation had been adopted at the time.

Q. (By Mr. Henry): I will refer you to one more section of the Congressional Record here, Mr. Goodale.

With particular reference to this so-called free period or the period during which there would be automatic coverage but no premium paid or policy issued, I ask you whether you are familiar with the following statement. This appears at page 2660 of the same volume to which I am referring:

“Mr. Smith of Ohio: Hearings on this bill”——

Referring to the War Damage Corporation Bill——

“by the Banking and Currency Committee were held on the second, third, fourth, and fifth of January. The question was raised seriously in the committee as to whether it might not be feasible to provide for the payment of premiums on property which might be lost up to the time of the writing of the insurance contracts. At that time we were not thinking of any damage except that which occurred at Pearl Harbor. The committee for [57] some reason took no action on requiring such premium payments.

(Deposition of Robert C. Goodale.)

Since that time, we have had an immense amount of sinkings. I would like to have an expression from the gentleman from Alabama as to whether we may not have made a mistake in not providing for premium payments on property which might be destroyed up to the time when actual contracts can be written.

“Mr. Steagall: Of course, that is a matter that is past. What the conference does is to embody the House provision in that respect, so that the matter is closed.”

Are you familiar with that? A. Yes.

Q. Isn't it your understanding, Mr. Goodale, that by that statement, the Congressman, Mr. Steagall, who was answering the question, was stating that as far as the free insurance period is concerned, the matter was closed, and the sinkings were covered without the payment of premium or issuance of a policy?

Mr. Charles: The same objection as I made before.

The Witness: If your question is as to whether the sinkings of hulls was covered without a policy, I do not so understand.

Q. (By Mr. Henry): But you do understand it as far as the sinking of [58] cargo?

A. I do.

Q. It was this same gentleman who spoke of the losses that I mentioned before, of ships and cargo; isn't that correct? A. Yes.

(Deposition of Robert C. Goodale.)

Q. Are you familiar, Mr. Goodale, with whether or not cargo insurance for war risk was available in the commercial market to any of the persons or companies who have been paid by the War Damage Corporation on losses of cargo arising from enemy action during this so-called free period prior to July 1, 1942?

A. I am not an expert on that question, but my understanding is that it was.

Q. So that all that you required from cargo claimants was assurance that they did not have any war risk insurance, but you did not require them to show that they were unable to obtain it?

A. We did not require them to show that they were unable to obtain it.

Q. And you understand as a fact, Mr. Goodale, at least the contention of the Matson Navigation Company in this proceeding is that they had no war risk insurance on the Lahaina?

A. That is my understanding. [59]

Q. So whatever action has been taken with respect to the claim of the Matson Navigation Company in this proceeding is not based upon the fact or contention on the part of the War Damage Corporation that Matson Navigation Company had war risk insurance on the Lahaina?

A. We have never had the opinion that the Matson Navigation Company did have war risk insurance on the Lahaina.

Q. But the denial of the claim was not because of any assumption on your part that the Matson

(Deposition of Robert C. Goodale.)

Navigation Company had war risk insurance on the Lahaina?

A. No. It was irrespective of that.

Q. I just wanted to make it clear that that was not the reason for the denial of the claim. That is correct, isn't it?

A. That is correct.

Q. Was there any action where the War Damage Corporation required a premium to be figured, computed, and paid by any claimant for the period from Pearl Harbor to July 1, 1942?

A. No.

Q. Did you ever issue a policy, let us say, retroactively or otherwise, to such a claimant, that is, for the period prior to July 1, 1942?

A. We never have.

Q. Now, with reference to this schooner *Aeolus*. Where was it lost? [60]

A. Off Maine.

Q. She was engaged in fishing, was she not?

A. Yes

Q. Do you think that she was lost inside or outside of the three mile limit?

A. Outside, I think.

Q. Was she bound to any other port than a port of the United States at the time?

A. No.

Q. Was she bound for any port, or was she on a fishing venture?

A. She was on a fishing venture.

Q. She was not bound for any particular port at the time of her loss; is that your understanding?

A. It is my understanding that she was bound to return to her own port.

(Deposition of Robert C. Goodale.)

Q. But she was going to the fishing grounds at the time of her loss? A. Yes.

Q. What was the amount of that claim, Mr. Goodale? A. I don't recollect.

Q. Approximately, to the best of your recollection?

A. It was not large, but my guess would be that it was certainly under \$100,000.

Q. The day-to-day practice that you mentioned I believe [61] you stated was embodied in the final regulations known as the resolution of October 2, 1944, did not cover any claims for the hulls of vessels. Isn't that correct, as far as the day-to-day practice is concerned?

A. Will you read the question?

Mr. Charles: I do not understand it, either.

(The pending question, as above recorded, was thereupon read by the reporter.)

The Witness: The regulations related to hulls, but excluded hulls from free protection.

Q. I understand that is true from the face of the regulation, Mr. Goodale, and I am just trying to bring out from you without trying to mislead you in any way that your general statement as to the regulations referring to the day-to-day practice, as I understand it, in the consideration of the claim, would not have covered any claims for hulls because you did not have any day-to-day practice, or you did not have enough volume on any claims for hulls to say that there had been a day-to-day practice that was being embodied in the regulation?

(Deposition of Robert C. Goodale.)

A. I refer to the day-to-day practice at present and recently. I have not at any time referred to day-to-day practice as to the handling of claims for hulls. On the contrary, I stated I believe there have only been three claims for hulls of ships asserted.

Q. That is up to the present time?

A. Yes.

Q. I wanted to make out definitely that there was no day-to-day practice on hulls because there has been no such frequency of them that you could properly say that there had been any day-to-day practice. A. That is right.

Q. You recall, and I think you did mention in response to a question by Mr. Charles, that this regulation, embodied in the resolution of October 2, 1944, was considered and acted upon by the Executive Committee of the War Damage Corporation.

In other words, was the resolution formally adopted?

A. It was a resolution formally adopted either by the entire board or by the Executive Committee.

Q. Either one, whether it is the Executive Committee or the Board? A. Yes.

Q. Do you recall the occasion under which that resolution was presented to the Board? That is, whether there was a particular claim that was in the hopper, so to speak, that prompted the adoption of that resolution?

A. I recollect that at that time there was pending another ship claim of the Union Oil Company.

(Deposition of Robert C. Goodale.)

Q. And that is the Montebello? [63]

A. Yes.

Q. And that was the reason, is it not a fact, that prompted the Board under yours, or somebody else's suggestion to adopt such a resolution?

A. I should say not mainly the reason, nor the occasion for its adoption.

I should say that the main reason for its adoption was the anticipated early compulsion of the Board's undertaking adjustments of Philippine claims, which was a big part of the job originally assigned to the War Damage Corporation.

One instance during its adoption and one occasion for its adoption was to clarify the record of the corporation as to its having exercised the authority committed to it by the statute to exclude certain property that had been excluded.

Q. You do not recall, then, that in the minutes of the meeting of the Board or the Executive Committee for that date, October 2, 1944, the statement was made in substance that a claim on the West Coast was put forth for the loss of a hull?

A. I think that was mentioned, and that was one of the immediate incidents or reasons for the present adoption of the resolution.

Q. Is it not a fact, Mr. Goodale, that that was the primary reason, but in an effort to try to have the resolution [64] fit in with some of the general language of the statute, the resolution itself was made in general language?

A. No, it was not.

(Deposition of Robert C. Goodale.)

Q. Under the War Damage Corporation Act, as you understand it, Mr. Goodale, and the policies that were issued following July 1, 1942, was the rolling stock of railroads covered?

A. It was.

Q. It was subject to coverage?

A. Yes, I believe it was.

Q. Did you have any claims where there was an actual loss? A. No.

Q. It was just fortunate there was no loss; is that correct?

A. As far as I know, there was no such loss.

Q. Mr. Goodale, is it your understanding that a railroad car carrying freight, even though moving from one American city to another, would be covered during the free period if it were destroyed by an enemy act?

A. That is purely a hypothetical question which the War Damage Corporation has never had occasion to pass on.

Q. Mr. Charles has asked you a question here concerning the interpretation, et cetera, of the various matters, and now I am asking you, if I may, what your understanding would [65] be of that situation that I have mentioned, whether a railroad car in a train, carrying cargo from one American city to another, would be covered if it were destroyed by an enemy attack during the free period, let us say, from December 7, 1941, to July 1, 1942, so you do not have any question about whether a policy was issued.

(Deposition of Robert C. Goodale.)

Mr. Charles: I object to the question on the ground that it is a hypothetical question and is argumentative and simply calls for the witness' opinion as to a situation that has not arisen, as distinguished from the question which I have asked which related to the interpretation of the statute by the corporation in its acts in excluding types of property and in paying certain proportions of loss. That is, questions bearing on what has been administrative interpretation of the statute are relevant in the interpretation of the statute, but questions which have not arisen are not relevant.

The Witness: In answer to your question, it depends wholly on the location of the railroad car at the time of its loss or destruction. If it was lost or destroyed while being towed on a canal boat from New York to Philadelphia, outside of the three-mile limit, I think it would not be covered, but if it were on a Pennsylvania Railroad track within the United States, I think it would be covered. [66]

Q. (By Mr. Henry): So, you would determine it solely on whether it is within the continental limits of the United States at that time?

A. Or within any of its possessions.

Q. Yes, the continental limits of the United States or its possessions.

A. Yes.

Q. Let me ask you this, Mr. Goodale: If the Lahaina, while at anchor in Honolulu Harbor, let us say, I guess it was at Aukini, before it was loaded with Cargo and before she had started her voyage, had been destroyed by a Japanese bom-

(Deposition of Robert C. Goodale.)

bardment on or about December 7, 1941, would you consider that such a vessel was covered?

Mr. Charles: Same objection.

The Witness: That is another hypothetical question representing a situation which, so far as I know, has never arisen in connection with war damage claims.

Q. (By Mr. Henry): I will ask you for your best answer that you can give us, Mr. Goodale. In your testimony here you have attempted to give us your own opinion as to what "in transit" means, and I consider this proper cross-examination in testing your experience and credibility, and in using the word credibility, I do not refer to it in its invidious sense, [67] but experience and credibility in qualifications in making such a statement as you make regarding the meaning of the words "in transit."

Mr. Charles: The same objection.

The Witness: In my opinion, such a loss would not be protected by War Damage Corporation in view of the resolution of October 2, 1944.

Q. (By Mr. Henry): But solely by reason of that resolution of October 2, 1944; is that correct?

A. I would not say solely by reason of the resolution, but also because of the duty of the War Damage Corporation to apply as a limit to authorize activities the limit of the intent of the act under which the War Damage Corporation operates.

(Deposition of Robert C. Goodale.)

Q. Then it goes back to your determination, isn't that true, of what the phrase "in transit" means?

A. What it means in the light of the legislative history of the Act.

Q. In view of the fact that the House of Representatives saw the direct question of whether or not sinkings are covered and the reply was given as yes——

A. The reply was given yes, but was referred to Mr. Bland and Mr. Bland answered no.

Q. I am talking about the sinkings. There is another [68] statement with which you agree, and that was the direct question: Does this cover the present sinkings and the answer was yes.

A. Sinkings of what?

Q. Just what was in the Congressional Record that I read to you.

A. There is nothing in the language which militates against the conclusion that seems inescapable from reading the entire legislative history. Congress definitely intended not to provide free protection for the Marine losses in general. Because of it, it made an exception as to cargoes that were in transit, and these losses before the war damage insurance could be made available.

Q. And that is solely your interpretation of the thing?

A. I would say not solely mine, but it is my interpretation.

Q. Then, Mr. Goodale, do you know what insurance, if any, was actually available through the

(Deposition of Robert C. Goodale.)

Maritime Commission on December 11 and 12, 1942, for the owners of vessels?

A. That is not within my province or purpose to answer.

Q. Your conclusion was your own opinion as to what the Congressional intent was, and consequently the manner in which you have recommended the administration of the War Damage Corporation Act to exclude hulls is not dependent upon any knowledge of what the actual situation was in December [69] of 1941 with respect to the availability of hulls war risk insurance for the owners of vessels from the United States Maritime Commission?

A. Naturally. It is not dependent entirely on the availability of insurance of the Maritime Commission because it was the clear intention of the Congress not to provide free protection where war risk insurance was available through ordinary insurance channels or private companies.

Nobody doubts that such insurance was available.

Q. I think you answered previously, Mr. Goodale, that it was your practice to pay the owners of cargo for losses during the free period, whether or not they had available to them ordinary commercial war risk insurance. Is that right?

A. My first statement on that subject was that I mentioned an exception to the general rule otherwise applicable, and I believe that exception was compelled by the Congressional Record of a ques-

(Deposition of Robert C. Goodale.)

tion and answer as to whether the losses on the cargo on the City of Atlanta were covered under the bill.

Q. And the answer was what?

A. It was, in effect, that they were covered.

Q. Is it not also true that during the free period you paid for purely land losses unconnected with any Marine enterprise or venture, assuming that the loss occurred within [70] the United States or within the territorial boundaries of the United States or its possessions?

A. I do not fully understand the question. We did not assume that any losses occurred in the United States, but where losses occurred in the United States or in its possessions, claims were laid without regard to the fact that insurance may possibly have been obtainable by paying a higher rate of premium.

Q. Did you make any investigation as to what those premium rates were?

A. I have seen a statement on that, yes.

Some of them are in the Congressional Record.

Q. It is a fact that there was available through ordinary channels, in the sense of commercial insurance, war risk insurance for damage to land structures and objects?

A. And in some locations they had very limited amounts, but in a broad way, it was not available.

Q. Upon what do you base that statement, Mr. Goodale, as far as your own personal knowledge is concerned?

(Deposition of Robert C. Goodale.)

A. It was repeatedly made in Congress, and I know of one or two companies. It has previously been stated that there were no private companies who were able to provide any real protection against large losses through bombing within the United States.

Q. Do you know what funds the United States Maritime [71] Commission had available to it for any kind of insurance that it was authorized to place on Marine risks in December of 1941?

A. As I recall it was quite a small amount, possibly as little as \$40 million or \$100 million. That has no important bearing, as I can see, on the matter that you are discussing. That is an agency of the United States Government, and its capacity to pay would not necessarily be limited to funds then available to it.

Q. It would be overcome by additional legislation; is that correct?

A. That is right.

Q. And that is the same situation with respect to the War Damage Corporation?

A. Yes,—but not as to private insurers.

Q. In other words, the War Damage Corporation presumably had the authorization of Congress, and the taxing power of the United States to supply funds?

A. That is suggested in the Congressional Record. I do not subscribe to the idea that there is any obligation on the part of the United States to furnish further funds.

(Deposition of Robert C. Goodale.)

Q. Likewise, there would be no obligation on the United States in connection with supplying additional funds to the Maritime Commission; is that correct?

A. I do not know whether that analogy applies, or not. [72] In one case there is a corporation organized to do business which ordinarily has been done by a private corporation, and in the other case there is a direct agency of the United States Government.

Your question seems to be so far afield that I am utterly at a loss to conceive its relationship to the present case.

Q. In any event, the sum and substance of it is that as far as whatever program the Maritime Commission itself had, it was not the determining factor in your mind in concluding that hulls *on* vessels were not covered?

A. It was not conclusive. It had a bearing on the intent to cover them. That is another matter, I think. There is an additional reason for their exclusion because the Government had provided at approximately the same time a different mode of meeting the same problem.

Q. What bearing, if any, on any of your losses for commercial cargo did the fact that the Maritime Commission had authority to issue policies of insurance for Marine war risks on cargoes have on the action of the War Damage Corporation in paying any losses for loss of cargo by enemy action prior to July 1, 1942?

(Deposition of Robert C. Goodale.)

A. You are speaking only of loss of cargo?

Q. Yes.

A. I don't see that it had any. [73]

Q. All right. So that even though a cargo owner during the free period—that is, between December 7 and July 1, 1942, had available to him both the commercial market of war risk insurance and the Maritime Commission for war risk cargo insurance, if such a cargo owner lost a cargo by enemy action, in transit between ports of the United States or from a port of the United States and one of the possessions of the United States and had no such commercial war risk insurance or no such insurance from the Maritime Commission, the War Damage Corporation would pay for such a loss; is that correct?

Mr. Charles: I object to the question on the same ground I heretofore mentioned, and on the additional ground that it has been asked and answered.

The Witness: Yes.

Mr. Henry: I think that is all.

Redirect Examination

By Mr. Charles:

Q. Mr. Henry referred to a passage in the Congressional Record in which Mr. Steagall had been asked a question, as to whether the Act covered certain losses, and you answered that referring to the substance of the Congressional Record that followed in which Mr. Bland was asked to answer the question by Mr. Steagall, I would like to ask

(Deposition of Robert C. Goodale.)

you if you would, for the purpose of clarifying and substantiating the [74] answer, read to us that particular testimony.

I will show you, Mr. Goodale, the Congressional Record for March 2, 1942, appearing at page 1847, and ask you if you will read to us the testimony or the statement that appears, which you have in mind:

A. "Mr. White: Does this war insurance corporation apply to cargoes and ships on the high seas?

"Mr. Steagall: Yes, under certain conditions.

"Mr. White: Then the corporation is taking direct losses in all the torpedoings of cargoes and oil tankers and things like that under the operation of this Act.

"Mr. Steagall: I yield to the gentleman from Virginia, Mr. Bland, who will make an explanation that I was going to make to the gentleman.

"Mr. Bland: Things like that are being taken care of under the War Insurance Bill which was extended today. I have just put into the basket a report on the amendments to that bill which covers every phase of the Marine liability and risk."

May I correct one answer I made?

Q. Surely.

(Deposition of Robert C. Goodale.)

A. I was asked whether that remark related to legislation to be enacted rather than legislation that had been enacted. [75]

I did not then have the Congressional Record before me, and upon reading it, I am not clear that it related wholly to legislation to be enacted, but I believe that it related also to legislation that had been enacted.

I think that is all.

Mr. Henry: I believe that is all.

Mr. Charles: That is all.

/s/ ROBERT C. GOODALE.

Subscribed and sworn to before me, this 28th day of March, A.D. 1947.

[Seal] /s/ LLOYD L. HARKINS,

Notary Public in and for the
District of Columbia.

My commission expires August 14, 1947. [76]

United States of America,
District of Columbia.

I, Lloyd L. Harkins, a notary public duly commissioned and qualified in and for the District of Columbia of the United States, aforesaid, do hereby certify that there came before me on the 17th day of March, A.D., 1947, at 10 o'clock a.m., in the office of the Reconstruction Finance Corporation, 811 Vermont Avenue, Northwest, Washington, D. C., the following-named persons, to wit:

(Deposition of Robert C. Goodale.)

Mathias W. Knarr and Robert C. Goodale, who were by me duly sworn to testify the whole truth and nothing but the truth of their knowledge touching and concerning the matters in controversy in this action, and that they were thereupon carefully examined, upon their oaths, and their examinations reduced to writing under my supervision; and that the deposition is a true record of the testimony given by the witnesses; and that the said witnesses read the same and subscribed their names thereto.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in this action.

In witness whereof, I have hereunto set my hand and affixed my notorial seal this 28th day of March, A.D. 1947.

/s/ LLOYD L. HARKINS,

Notary Public in and for the
District of Columbia.

My Commission expires August 14, 1947.

Cost \$49.10. [77]

[Defendant's Exhibit No. 1 is identical with Defendant's Exhibit A attached to Answer, and is set forth on pages 23 to 42.]

DEFENDANT'S EXHIBIT No. 2

W.D.C.—AMENDMENT TO REGULATIONS

“A” EFFECTIVE JULY 1, 1942

War Damage Corporation

Washington, D. C.

Amendment to Regulations “A”

1. Rule 10 of Regulations “A” is hereby amended to read as follows:

“Rule 10.—Policies may be issued to mortgagees or other holders of security or financial interests in property eligible for coverage under these Regulations. The rate shall be determined according to these Regulations on the basis of the coded classification of the property and risks covered and the coverage shall be subject to all the conditions of the Policy; except that, with respect to any occupancy classification to which the ‘Coinsurance’ clause contained in the Policy is applicable, if the Applicant shall so elect, the Applicant may apply for insurance to the full extent of its interest in the property described in the Application and in such case, the Application shall set forth the declared dollar amount of the Applicant’s interest in the property therein described. The rate for such coverage shall be the highest rate applicable to property under the respective coded classification as set forth in the Rate Schedule of Appendix “A.” The Fiduciary Agent shall, in any such case, attach to the Policy the following form of endorsement:

“The ‘Pro Rata Distribution’ clause and the ‘Coinsurance’ clause contained in this policy are not applicable. All other terms and conditions of this policy remain unchanged.

“(Authorized Fiduciary
Agent.)

“By _____”

“If blanket policies are issued covering mortgagee or other financial interests, the provisions of these Regulations relating to ‘Blanket Insurance’ shall apply.” (See Rule 9.)

2. The limit of coverage set forth in Rule 23 of Regulations “A” shall be inapplicable to “Furs” and “Jewelry” and such property shall be eligible for coverage without limitation. The rate for such coverage shall be the rate applicable to the appropriate coded classifications in lieu of the rate set forth under Occupancy Code 15 in the Rate Schedule of Appendix A.

3. Regulations “A” are hereby amended by adding thereto the following rule:

“Coverage for Standing Timber

“Rule 26.01—Standing timber may be specifically covered, provided the Application (WDC Form No. 2) or the Schedule attached thereto sets forth separately the description, location and amount of coverage of the standing timber to be so covered. No limit of coverage shall be applicable. The rate for such coverage shall be 15 cents, with 100% coinsurance mandatory. In any such case the Fiduciary Agent shall attach to the Policy the following form of endorsement:

"This policy is hereby extended to cover the standing timber described in the Application (and the Schedule, if any) which is attached to this policy. All other terms and conditions of this policy remain unchanged."

"....."

(Authorized Fiduciary
Agent.)

"By"

4. Rule 26 of Regulations "A" is hereby amended to read as follows:

"Rule 26—Growing crops and orchards may be specifically covered provided the separate form of Application for insurance covering growing crops and orchards is completed by the Applicant, such coverage to be at the following graduated rates: 5c for the first \$100,000, 7½c for the second, 10c for the third, 12½c for the fourth, and 15c for all coverage in excess of \$400,000; with no coinsurance requirements or credits being applicable."

DEFENDANT'S EXHIBIT No. 3

W.D.C.—AMENDMENT TO REGULATIONS

"A" EFFECTIVE OCTOBER 1, 1942

War Damage Corporation
Washington, D. C.

Amendments to Regulations "A"

Regulations "A" are hereby amended by adding thereto the following Rule:

"Registered Mail or Express Coverage for Money and Securities (Occupancy Code 18)

“Rule 26.02—Money and Securities may be covered under the Policy while in transit by Registered Mail or Express (including Registered Airmail and Air Express) provided the separate form of Application (WDC Form No. 15) for such Registered Mail or Express coverage is completed by the Applicant. The terms ‘Money’ and ‘Securities’ are defined in Item 5 of said Application and the coverage limitations are set forth in Condition (b) appearing on the reverse side of said Application. The premium for such coverage will be computed on the basis of the declaration of maximum estimates of aggregate values of shipments of Money and Securities by the Applicant for the full period of twelve months from the effective date of the insurance and adjustment will be made at the end of the term of the Policy based upon the written report of the total values of Money and Securities actually shipped by the Applicant during such term, all as described in Condition (f) appearing on the reverse side of said Application. The rates for such coverage are set forth in Item 3 of said Application, as follows: For Money, 3c per \$1,000 of total aggregate declared value; for Securities, 1c per \$1000 of total aggregate declared value. Coverage is provided with respect to both of the following: Class A—Shipments made by, to, or for the account of the Applicant; Class B—Shipments by the Applicant for the account of others. Class B coverage is optional. Class B coverage cannot be obtained without Class A coverage. The limits of liability are \$500,000 for Money and \$2,000,000 for Securities with respect to

any one shipment to any one consignee on any one day. The 'Pro Rata Distribution' clause and the 'Coinsurance' clause contained in the Policy are not applicable and all other terms and conditions of the Policy are to be considered amended and modified to the extent necessary to conform to the provisions of said Application."

DEFENDANT'S EXHIBIT NO. 4

MINUTES OF A MEETING OF THE EXECUTIVE COMMITTEE OF WAR DAMAGE CORPORATION

October 2, 1944

A meeting of the Executive Committee of War Damage Corporation was held at 811 Vermont Avenue, N. W., Washington, D. C., at 12:30 p.m., Monday, October 2, 1944, in accordance with Paragraph 5 of the By-Laws.

Present: Directors: Mr. Klossner, president, presiding; Mr. Husbands, Mr. Mulligan, Mr. Knarr, secretary.

Leo Nielson, assistant secretary, Reconstruction Finance Corporation, also was present.

Mr. Klossner suggested that, before beginning the investigation of the principal group of claims for which the Corporation is charged with responsibility (i.e., those arising in the Philippine area), it may be advisable to consolidate and clarify the Corporation's record with respect to the protection extended in connection with losses occurring before

July 1, 1942. Mr. Klossner called the attention of the Directors to the following matters:

That on December 13 and December 22, 1941, the Board of Directors of this Corporation approved two press releases of the Federal Loan Administrator which announced that reasonable protection would be provided by this Corporation with respect to loss of or damage to property resulting from enemy attack, and expressly excluded from such protection certain classes of property;

That on June 3, 1942, the Board of Directors and the Secretary of Commerce approved (1) Regulations "A" of this Corporation, which excludes certain classes of property and risks from protection under insurance issued pursuant to Section 5g of the Reconstruction Finance Corporation Act, as amended, including the classes of property mentioned in the press releases theretofore issued by the Federal Loan Administrator, and (2) WDC Forms Nos. 1, 2, 3, 4, 5, 6, and 7, which exclude from protection under policies issued pursuant to subsection "(a)" of Section 5g of the said Act certain classes of property and risks, including all cargoes on ocean-going, coastwise, inter-coastal or overseas vessels, whether in United States ports or otherwise;

That immediately upon the first employment of adjusters to investigate claims filed with the Corporation for compensation for losses occurring after December 6, 1941 and before

July 1, 1942, this Corporation, by authority of the Board, and with the approval of the Secretary of Commerce, issued instructions to such adjusters to the effect that the classes of property and risks theretofore excluded, either conditionally or unconditionally, under the terms of this Corporation's regulations and official forms of policies and of applications for insurance, had been excluded from the protection authorized by subsection "(b)" of Section 5g of the Reconstruction Finance Corporation Act, as amended.

Mr. Klossner stated that a question recently had been raised by a claimant as to whether this Corporation might be under legal obligation to make compensation for the hulls, equipment, and cargoes of vessels lost by enemy attack while enroute between ports of the United States and foreign ports, if such vessels were destroyed within three miles of the shores of the United States. Mr. Klossner indicated that although the Act (Public Law No. 506—77th Congress) defining the scope of the War Damage Corporation's authority specifically limits liability on property in transit "to such property in transit between any points located in any of the foregoing" and, consequently, could not, under any circumstances, be held to apply in the instance referred to, a clarification of the Board's action regarding various classes of property was desirable. Mr. Klossner then recommended that, in order more clearly to set forth the intent of the Corporation

and to put at rest any doubt as to the Corporation's having fully exercised, to the extent presently advisable, its statutory authority to exclude from the protection authorized by Section 5g of the Reconstruction Finance Corporation Act, as amended, the classes of property and risks intended by the Board to be so excluded, and which have, in fact, been excluded from compensation throughout the existence of this Corporation, the Executive Committee adopt the Resolution hereinafter set forth. After discussion, the Executive Committee reserved for further consideration the question of the advisability of excepting from protection under the said Act the property of foreign nationals within the Philippine Islands, and the question of excepting from such protection all property requisitioned by the United States or any agency thereof, as well as the advisability of any other or further exceptions from such protection.

Thereupon, the Executive Committee adopted the following resolution, which bears the approval of the Secretary of Commerce, as required by Section 5g of the Reconstruction Finance Corporation Act, as amended March 27, 1942 (Public Law 506—77th Congress):

“Be It Resolved, That War Damage Corporation, deeming advisable the following general exceptions to the protection authorized under Section 5g of the Reconstruction Finance Corporation Act, as amended (Public Law No. 506, 77th Congress)

“1. Does except from such protection (a) all accounts, bills, currency, deeds, evidences of debt,

securities, money, bullion, stamps, precious and semiprecious stones, works of art, antiques, stamp and coin collections, manuscripts, models, curiosities, objects of historical and scientific interest, pleasure water-craft and pleasure aircraft, and standing timber, not specifically listed or designated as insured under a policy of insurance issued by this Corporation; (b) all property interests of an 'enemy' or an 'ally of an enemy' as defined in the Trading with the Enemy Act, as amended, or of an alien enemy, whatever resident, or of any person or persons, real or juridical, whose names are contained in the Proclaimed List of Certain Blocked Nationals, as amended, unless legally protected under a policy of insurance issued by this Corporation; (c) all furs and jewelry not specifically listed or designated as insured under a policy issued by this Corporation, except furs and jewelry of any claimant or policyholder to an aggregate value not exceeding \$1,000.

"2. Does except from any and all protection under said Act the following:

- (a) all intangible property (other than securities insured under a policy of insurance issued by this Corporation);
- (b) all real property (other than standing timber, growing crops and orchards) not a part of a building or structure;
- (c) all cargo on ocean-going, coastwise, inter-coastal, or overseas vessels, whether in the ports or inland or coastal waters of the United States, the Philippine Islands, the

Canal Zone, or the Territories or possessions of the United States or otherwise (except cargo damaged or destroyed before July 1, 1942, by enemy attack while in transit between points located in any of the foregoing), and all goods and property which are or have been diverted to, detained at, or unloaded, landed, or stored within, the United States, the Philippine Islands, the Canal Zone, or the Territories or possessions of the United States while in transit by sea to or from a foreign port, so long as such goods shall be detained or prevented from proceeding to their ultimate destinations as designated in the applicable ocean bills of lading, or shipping documents;

- (d) all vessels and water-craft wherever situated (and their tackle, apparel, fittings, equipment, stores, ordnance, boilers and machinery), other than (a) vessels used exclusively for storage, housing, manufacturing or generating power, (b) vessels while under construction, until delivery by the builder or sailing on delivery or trial trip, whichever shall first occur, and (c) pleasure water-craft while laid up afloat or ashore, which are subject to protection within the limits indicated in paragraphs 'I' and 'E' of this resolution;
- (e) all loss or damage caused directly or indirectly by neglect of the insured, or of the

claimant (as the case may be) to use all reasonable means to save and preserve the property after damage;

- (f) all interest of foreign nationals in property located, at the time of loss, otherwise than within the United States, the Canal Zone, or the Territories or possessions of the United States;
- (g) all other classes of property heretofore generally excepted by this Corporation, with the approval of the Secretary of Commerce, from the protection authorized by said Act; all claims with respect to which notice of loss and proof of claim have not been or shall not be presented to and filed with this Corporation in accordance with its regulations as from time to time promulgated and in effect; and all claims not proved and established to the satisfaction of the Corporation; the Corporation reserving the right to except from the protection authorized by the Act such other classes of property as it shall deem advisable.

“Be It Resolved Further, That

- A. All property insured against war risks by insurers other than this Corporation be, and the same is excepted from protection under the said Act in any amount greater than the excess of the fair cash value of such property over and above the amount of such other insurance, whether collectible or not.

- B. Works of art, antiques, stamp and coin collections, manuscripts, books and printed publications more than 50 years old, models, curiosities, and objects of historical or scientific interest owned by commercial dealers, cultural institutions or persons who keep the same open for public display, are excepted from protection under the said Act otherwise than in an amount not exceeding \$25,000 for any one article of any of the classes in this paragraph 'B' described, as well as conditionally excepted from protection as provided in paragraph '1' of this resolution.
- C. Furs, jewelry, works of art, antiques, stamp and coin collections, manuscripts, books and printed publications more than 50 years old, models, curiosities, and objects of historical or scientific interest, when privately owned and not open for public display, are excepted from protection under the said Act otherwise than in an amount not exceeding \$5,000 for any one article of any of the classes in this paragraph 'C' described, and not exceeding a total of \$10,000 for any one interest with respect to any or all of the aforementioned classes of property wherever located, as well as conditionally excepted from protection as provided in paragraph '1' of this resolution.

- D. Records, accounts, plans, drawings and formulae are excepted from protection under the said Act otherwise than in an amount not exceeding \$10,000 for any one film, copy, record, account, plan, drawing or formula, as well as conditionally except from protection to the extent provided in paragraph '1' of this resolution.
- E. Pleasure water-craft while laid up afloat or ashore and pleasure aircraft are excepted from protection under the said Act otherwise than in an amount not exceeding \$10,000 for any one craft, as well as conditionally excepted from protection as provided in paragraph '1' of this resolution."

The approval of the Secretary of Commerce referred to follows:

"Pursuant to the provisions of Section 5g of the Reconstruction Finance Corporation Act, as amended, I hereby approve the general exceptions to the protection made available under said Act, as set forth in the foregoing resolution.

"Dated this 2nd day of October, 1944.

/s/ "JESSE H. JONES,
"Secretary of Commerce."

Thereupon the meeting adjourned.

[Seal] M. W. KNARR,
Secretary.

DEFENDANT'S EXHIBIT NO. 5

Immediate Release

RFC-1718

The Secretary of Commerce
Washington

December 30, 1942

Jesse Jones, Secretary of Commerce, today announced that War Damage Corporation will investigate claims for loss of property in transit between any points located in the United States, and the Canal Zone, and the Territories and possessions of the United States with the exception of the Philippine Islands. All claims for loss of property in transit between such points which resulted directly from enemy attack between December 6, 1941 and July 1, 1942 should be filed with the Washington office of War Damage Corporation on or before February 1, 1943. Investigation of such claims will be conducted in accordance with the provisions of Section 5g of the Reconstruction Finance Corporation Act, as amended.

All claimants are notified that, notwithstanding the investigation, War Damage Corporation reserves the right, in accordance with the statute and the regulations issued thereunder, to determine whether or not the Corporation is liable.

(Copy)

[Endorsed]: Filed April 1, 1947.

PLAINTIFF'S EXHIBIT NO. 1.

Agreement between various Steamship Companies and the National Maritime Union of America, an Affiliate of the C.I.O. in its own behalf and in behalf of the Unlicensed Personnel for whom the National Maritime Union has been certified by the National Labor Relations Board as the agent for collective bargaining, employed on the various Companies' vessels registered under the American flag.

Expiration Date: September 30, 1941.

* * * * *

Section 29. Transiting Canals. When transiting canals, such as the Panama, Manchester, etc., men on their watch below who are required on deck for the purpose of handling lines, or standing by winches, etc., shall be paid the regular rate of overtime. On Saturday afternoons, Sundays, and holidays, overtime shall be paid all men required on deck standing by winches or handling lines.

* * * * *

[Endorsed]: Filed April 30, 1947.

[Endorsed]: No. 11925. United States Circuit Court of Appeals for the Ninth Circuit. Matson Navigation Company, a Corporation, Appellant, vs. War Damage Corporation, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 7, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11925

MATSON NAVIGATION COMPANY,
a Corporation,

Plaintiff and Appellant,

vs.

WAR DAMAGE CORPORATION, a Corporation,
Defendant and Appellee.

STATEMENT OF THE POINTS UPON
WHICH THE APPELLANT INTENDS TO
RELY ON THE APPEAL IN THE ABOVE-
ENTITLED CAUSE

Appellant, Matson Navigation Company, a corporation, hereby designates the following points upon which it intends to rely on the appeal of the above-entitled cause:

1. The District Court erred in finding that the American steamship Lahaina at the time of her loss was not property "in transit" within the meaning of the amendment of March 27, 1942, to the Reconstruction Finance Corporation Act, to wit: within the meaning of Section 5g thereof.
2. The District Court erred in concluding that Section 5g of the Reconstruction Finance Corporation Act, as amended on March 27, 1942, was not intended to, and did not, afford protection to seagoing ships, such as the

American steamship Lahaina, in transit on a voyage between a port or ports of the Hawaiian Islands and a port of the continental United States.

3. The District Court erred in failing to conclude that plaintiff was entitled to recover judgment from defendant in the principal sum of \$615,000.00 in accordance with its finding of fact that the reasonable value of the steamship Lahaina at the time of her loss was the said sum of \$615,000.00.

Dated: May 7, 1948.

/s/ HERMAN PHLEGER,
/s/ MAURICE E. HARRISON,
/s/ GREGORY A. HARRISON,
BROBECK, PHLEGER &
HARRISON.

/s/ LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Appellant.

Service of the within statement and receipt of a copy is hereby admitted this 7th day of May, 1948.

/s/ ALLAN E. CHARLES,
LILLICK, GEARY, OLSON,
ADAMS & CHARLES,
Attorneys for Appellee.

[Endorsed]: Filed May 7, 1948.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING PORTIONS
OF THE RECORD ON APPEAL TO BE IN-
CLUDED IN PRINTED RECORD ON
APPEAL

It Is Hereby Stipulated and Agreed that the following portions of the record on appeal shall be included in the printed record on appeal in the above-entitled cause, the page references being to the certified copy of the record on appeal:

1. Complaint of Matson Navigation Company, including the Exhibit thereto, pages 1 to 5, inclusive.

2. Answer of War Damage Corporation, including all Exhibits thereto, pages 6 to 20, inclusive, it being hereby stipulated that Exhibit "C" to said Answer is a full, true and correct copy of Defendant's Exhibit No. A introduced in evidence at the trial of said cause which said Exhibit No. A is, therefore, not designated to be reprinted.

3. Stipulation Amending Answer of War Damage Corporation, pages 21 and 22.

4. All stenographically reported proceedings appearing in the Reporter's Transcript of the trial.

5. All testimony taken by deposition and annexed Exhibits, to wit:

- (a) Deposition of Hans O. Matthiesen;
- (b) Deposition of George Inselman;
- (c) Deposition of M. M. Pease;
- (d) Deposition of Howard W. Cann;

- (e) Deposition of Harold L. Wayne;
- (f) Deposition of Matthias W. Knarr; and
- (g) Deposition of Robert C. Goodale.

6. Stipulation relative to value of steamship "Lahaina," page 25.

7. Stipulation that Plaintiff had no war risk insurance, page 26.

8. Stipulation relative to New York Journal of Commerce article and annexed Exhibit, pages 27 to 30, inclusive.

9. Opinion of District Court, pages 33 to 46, inclusive.

10. Minute Order of District Court for Judgment dated November 17, 1947, page 47.

11. Copy of Notice of Entry of Opinion, page 48.

12. Minute Order of District Court dated December 12, 1947 that Findings of Fact and Conclusions of Law be filed, page 62.

13. Findings of Fact and Conclusions of Law signed by District Court, pages 63 to 66, inclusive.

14. Judgment, pages 67 and 68.

15. Notice of Entry of Judgment, page 73.

16. Notice of Appeal, pages 74 and 75.

17. Designation of Contents of Record on Appeal, pages 80 and 81.

18. Copy of cover page and of section 29 on page 34 of Plaintiff's Exhibit 1.

19. Order of District Court extending time to file record on appeal and to docket appeal dated March 4, 1948, page 82.

20. Order of District Court extending time to file record on appeal and to docket appeal dated April 7, 1948, page 83.

21. Order of District Court for Transmission of original Exhibit to Clerk of the Circuit Court of Appeals, page 84.

22. Plaintiff and Appellant's Statement of the Points on which it intends to rely on appeal filed herein on May 7, 1948.

23. This Stipulation designating portions of the Record on Appeal to be printed.

Dated: May 12, 1948.

/s/ HERMAN PHLEGER,
/s/ MAURICE E. HARRISON,
/s/ GREGORY HARRISON,
BROBECK, PHLEGER &
HARRISON.

/s/ LYMAN HENRY,
HALL, HENRY & OLIVER,
Attorneys for Plaintiff and
Appellant.

/s/ IRA S. LILLICK,
/s/ ALLAN E. CHARLES,
/s/ EDWARD D. RANSOM,
LILLICK, GEARY, OLSON,
ADAMS & CHARLES,
Attorneys for Defendant and
Appellee.

[Endorsed]: Filed May 12, 1948.



No. 11,925

United States

Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY, a corporation,
Appellant,

vs.

WAR DAMAGE CORPORATION, a corporation,
Appellee.

Appellant's Opening Brief

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Of Counsel.

FILED

AUG 16 1948

PAUL P. O'BRIEN,

CLERK



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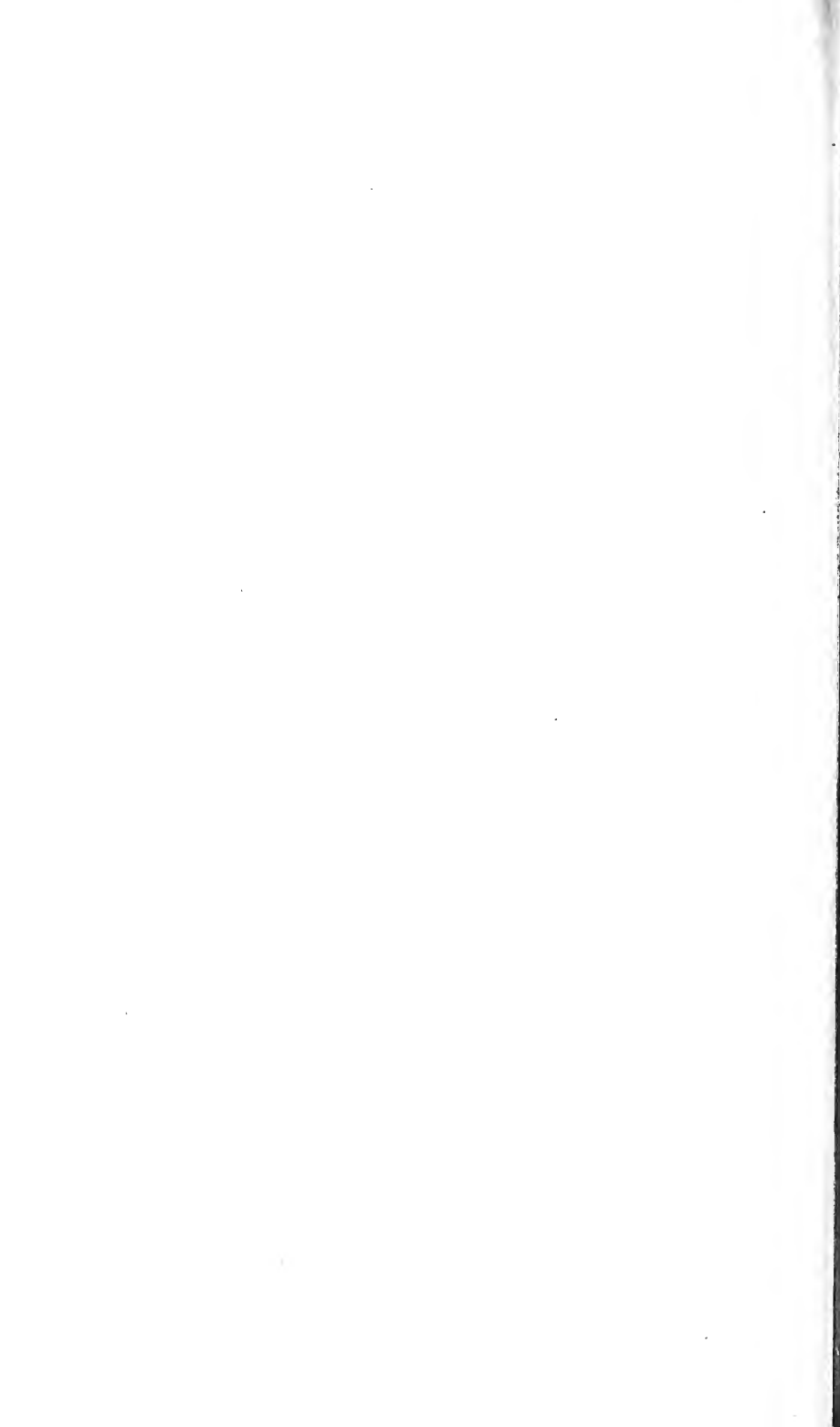
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No. 11925

United States
Circuit Court of Appeals
For the Ninth Circuit

MATSON NAVIGATION COMPANY, a corporation,
Appellant,

vs.

WAR DAMAGE CORPORATION, a corporation,
Appellee.

Appellant's Opening Brief

The single issue in this suit is whether Section 5g of the Reconstruction Finance Corporation Act, providing protection to the public against loss or damage from enemy attack, excluded from its benefits a vessel which was lost December 12, 1941 on a voyage from Hawaii to the United States.

A. STATEMENT REGARDING JURISDICTION

Appellant, Matson Navigation Company (hereinafter referred to as "plaintiff"), takes this appeal from a judgment of the United States District Court for the Northern District of California, dismissing its complaint against Appellee, War Damage Corporation (hereinafter referred to as "defendant").

Plaintiff filed suit against defendant on March 22, 1945, seeking to recover compensation for the loss of its steamship, the Lahaina, under the provisions of Section 5g of the Reconstruction Finance Corporation Act as added March 27, 1942 (15 U.S.C. 606b-2; 56 Stat. 175, Sec. 5g).

Defendant is a corporation formed under Section 5d of the Reconstruction Finance Corporation Act, and charged with administration of the War Damage Law. Under Article Third of its charter and under Section 4 of the Reconstruction Finance Corporation Act, it has the power to sue and can be sued in any court of competent jurisdiction (15 U.S.C.A. Section 604). The District Court is such a tribunal under 28 U.S.C.A. Sections 41(1) and 42.

The amount in controversy, exclusive of interest and costs, exceeds \$3,000 (6, 13, 83).¹ The pleadings, showing the jurisdiction of the District Court, are set forth in the complaint (2-6).

The Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under 28 U.S.C.A. Section 225 (a) (d).

On February 10, 1948, within ninety days after the first of the several orders² which might have constituted a final decision for defendant, plaintiff filed a Notice of Appeal (87).

Plaintiff filed a designation of the contents of the Record on Appeal on February 16, 1948 (88). On May 7, 1948, the Transcript of Record on Appeal was certified by the Clerk of the

1. References to the Transcript of Record on Appeal are indicated simply by reference to the page number as follows: "(....)."

2. In view of the uncertainties as to which of the several orders and findings made by the trial court constituted a final decision (cf. *Hoiness v. United States* (9th Cir.) 165 F.2d 504), plaintiff has appealed from all of them; namely, the formal judgment entered December 19, 1947 (85), together with whatever judgment for defendant might have been embodied in the Findings and order for filing same entered December 12, 1947 (81), the trial court's opinion dated November 17, 1947 (64), and the order directing entry of judgment for defendant filed November 17, 1947 (80).

District Court (92) and filed on the same day with the Clerk of this Court (376).

On May 7, 1948, plaintiff filed a designation of points to be relied upon in this appeal (377), and on May 12, 1948, a stipulation was filed designating the portion of the record to be included in the printed Record on Appeal (379).

B. STATEMENT OF THE CASE

One of the plaintiff's steamships, the Lahaina, left her last Hawaiian port on December 4, 1941, bound for a port in the continental United States. Her departure was three days before Pearl Harbor, at a time when there was no apprehension of war or warlike operations in the waters lying between Hawaii and the mainland. Indeed, what occurred on December 7th reveals that not even high military or naval authorities anticipated what transpired on that day. It is only natural then that the Lahaina did not have the benefit of war risk insurance; for there was nothing to indicate to prudent management the need for it.

On December 11, 1941, the Lahaina was attacked on the high seas by a Japanese submarine. After prolonged shelling, the crew successfully abandoned the ship by the only remaining life boat; they stood by until the Japanese craft departed and were able to return aboard ship removing some emergency equipment and supplies. They stood by until the ship sank and, after a hazardous trip in the open life boat, they arrived at the island of Maui.

It was stipulated that the fair cash market value of the Lahaina at the time of her sinking was \$615,000 (60) and that plaintiff had no war risk insurance of any kind covering her loss beyond that subsequently made available by Section 5g of the Reconstruction Finance Corporation Act (61).

At the time the Lahaina was sunk the United States had not yet made available any form of protection against loss from

enemy action. The Maritime Commission had been *authorized* to provide marine war risk insurance by the Merchant Marine Act of 1936 (Act of June 29, 1936, Ch. 858, Title II, as amended by Act of June 29, 1940, Ch. 447, 54 Stat. 690; 46 U.S.C.A. Sec. 1128a). It was not until a later date that the Maritime Commission commenced to exercise the powers given it.³

This situation did not long remain unremedied. Responding to a wide-spread public alarm and a sense of moral obligation toward unfortunate individuals who might suffer loss by the acts of the common enemy, Mr. Jesse Jones, the Federal Loan Administrator, with the President's approval, announced on December 13, 1941, that the defendant (then called "War Insurance Corporation") had been created to provide free protection against property losses thereafter occurring in the continental United States. Certain types of property, i.e., objects of art and intangibles, were excluded (4, 9). On December 22, 1941, another public announcement extended this coverage to property in certain territories (4, 9).

Up to this point, plaintiff had no claim for the loss of the *Lahaina*, because (1) the loss occurred December 12th, which was before the effective date of the coverage, December 13th, and (2) it occurred neither in the continental United States nor in a territory.

The protection provided by executive action was a temporary expedient. In January 1942 bills were introduced both in the House and Senate to put the matter of war damage protection on a firmer basis. We shall not pause here to follow the bills through the legislative process. For the present it is sufficient to point out that on March 27, 1942, the President approved a law adding Section 5g to the Reconstruction Finance Corpora-

3. Mr. Hamilton testified on January 27, 1942 that the Maritime Commission then had been writing war risk insurance both on cargoes and ships for about a month (Sen. Com. Hearings, p. 98).

tion Act (Act of March 27, 1942, Ch. 198, Sec. 2; 56 Stat. 175; 15 U.S.C.A. Sec. 606 b-2). The full text is set forth in Appendix A.

The statute did two things: *First*, it provided *for the future* (to go into effect not later than July 1, 1942) an insurance program against war damage, calling for the issuance of policies and the payment of premiums, to be administered by defendant; *Second*, it granted free protection for losses incurred between December 6, 1941, and the effective date of the paid insurance system.

The question on this appeal is whether vessels en route between Hawaii and the continental United States were excluded from free coverage granted by this statute.

Clearly, such a loss was covered by the broad language in which Congress granted defendant authority to use its funds:

"* * * to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to *property, real and personal*, which may result from enemy attack * * *"⁴

The unlimited scope of that language was narrowed by other provisions:

"Such protection shall be applicable only (1) to such property situated in the United States * * * the Territories * * * of the United States * * * (2) to *such property in transit* between any points located in any of the foregoing, * * *"

This appeal turns on the question of whether the Lahaina on the high seas en route between a territory and the United States, falls within the meaning of "such property in transit."

The language quoted above is, in part, that which directed defendant to set up an insurance plan for the future. It is equally applicable to the free coverage period because the part

4. Emphasis throughout this brief is ours unless otherwise indicated.

of the statute providing for free protection does not separately define the property covered.

On December 29, 1944, plaintiff presented its claim to defendant for the loss of the Lahaina (83). By a letter dated January 19, 1945, defendant rejected the claim, stating in explanation that it did not interpret the statute as intended to cover vessels and therefore, with the approval of the Secretary of Commerce, had excluded most types of watercraft (5-7, 12-13).

Plaintiff filed suit on March 22, 1945 (2). Defendant answered and, by paragraph II, denied that the Lahaina was "in transit" within the meaning of the statute (7-8), i.e., denied that a vessel en route from Hawaii to the United States was within the protection granted by the statute.

The court below sustained this defense and gave judgment for defendant from which this appeal has been taken.

Defendant also pleaded a host of affirmative defenses ranging from No. 1 (that the complaint did not state a cause of action) to No. 10 (that plaintiff had not filed a timely claim). All of these were ignored by the court below, both in the opinion (64) and the Findings of Fact and Conclusions of Law (81). Since the judgment rested solely on the interpretation of the statute, we shall devote our argument primarily to that matter.

C. SPECIFICATIONS OF ERROR

Plaintiff contends:

1. The District Court erred in concluding that Section 5g of the Reconstruction Finance Corporation Act, as amended on March 27, 1942, did not afford protection to seagoing ships.

2. The District Court erred in making what purports to be a "finding of fact"; namely, that the Lahaina was not on December 12, 1941, or at any other time, "property in transit" between a port in the Hawaiian Islands and a port in the continental United States within the meaning of Section 5g of the

Reconstruction Finance Corporation Act, as amended by the Act of March 27, 1942, and that its loss was therefore not compensable under that law.

3. The District Court erred in failing to conclude that plaintiff was entitled to recover judgment from defendant in the principal sum of \$615,000.00 in accordance with its finding that the reasonable value of the Lahaina at the time of her loss was \$615,000.00.

DISCUSSION

I. Preliminary Analysis

Plaintiff's contentions about the proper interpretation of this statute can be summarized very briefly:

1. The plain meaning of the statute, specifically the language "such property in transit," includes a vessel en route between Hawaii and the United States.

2. The plain meaning promotes the purpose of the Act and is consistent with its policy. In these circumstances it is improper to engage in a fishing expedition into legislative materials in the hope of capturing some vagrant remark to cast doubt upon otherwise evident conclusions.

3. The legislative history of the statute, i.e., the detailed consideration of what was said and done about specific language and provisions, is entirely consistent with the plain meaning revealed on the face of the statute.

4. Any other interpretation would create inequalities and discriminations foreign to the major purpose of the statute and to the sense of moral justice upon which it rests.

II. The Loss of the Lahaina Falls Within the Plain Meaning of the Statute

In this section we deal only with the meaning of the statute as derived from the language used. It is doubtless true that in appropriate circumstances a court may look beyond the face of

the statute. But the rule remains that in the absence of some contrary indication it must be assumed that Congress intended to convey the ordinary meaning which is attached to the language used. *Jones v. Liberty Glass Company*, 332 U.S. 524, 92 L.Ed. Adv. Op. 195, 68 S.Ct. 229.

As the court said in *Browder v. United States*, 312 U.S. 335, 85 L.Ed. 862, 61 S.Ct. 599: "The plain meaning of the words of the Act covers this use. No single argument has more weight in statutory interpretation than this." (p. 338).

Giving the words of this statute their ordinary meaning, we submit that the loss of the *Lahaina* unmistakably fell within the coverage of the statute.

Congress authorized defendant to provide protection against loss of property by enemy attack in the broadest terms imaginable:

"The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to *property, real and personal*, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable."

Whatever power defendant may have had to make exceptions is not involved in the immediate problem.⁵ We are here concerned only with the question of whether Congress intended to exclude vessels en route from Hawaii to the United States from the protection of the statute.

5. Defendant contended on the trial that it could and did except, from the free protection, losses of the character involved in this suit; that contention was disregarded by the trial court and is, we believe, without substance. If raised again in this court, it will be answered in plaintiff's reply brief.

We are unable to think of any words by which Congress could have conveyed more clearly an intent to cover every conceivable species of property. It will not be disputed, we assume, that the steamship Lahaina was personal property.

The immediately ensuing provisions of the statute directed defendant to make this protection available not later than July 1, 1942 and to establish uniform rates.

The scope of protection granted by the statute was further defined by the following limitations:

"Such protection shall be applicable only (1) *to such property situated in the United States* (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States, (2) *to such property in transit between any points located in any of the foregoing * * **"

It is simply indisputable that the reference in clause (1) to "such property" refers back to the words "property, real or personal" appearing in the provision first quoted. The limitation, then, does not narrow the kind of property protected but merely confines the protection to a geographical area. The Lahaina, anchored in San Francisco Bay, would have been within the protection of the statute along with every species of property in the United States and the other designated areas.⁶

6. One of the District Court's conclusions of law was that the statute did not afford protection to "*seagoing ships*." From such statement it might be considered that the Lahaina would not have been covered even within the continental United States. We see no basis for such view and we shall give no further attention to it unless defendant argues the point in the reply.

It is equally clear that the reference in clause (2) to "such property" refers back to the same words as the identical language in clause (1). To put it briefly, clause (1) covers *every* species of property while *situated* in designated geographical areas. Clause (2) covers *every* species of property while in *transit* between any of those areas.

So far as the plain meaning of words is concerned, the Lahaina, en route from Hawaii to the United States, falls within the coverage of clause (2) as constituting "such property in transit between any points located in any of the foregoing."

A special proviso applied to clause (2):

"PROVIDED, That such protection shall not be applicable after the date determined by the Secretary of Commerce under this subsection to property in transit upon which the United States Maritime Commission is authorized to provide marine war-risk insurance."

The effect of this provision was simply to exclude from the insurance program *to be set up for the future* any property in transit upon which the Maritime Commission was authorized to provide war risk insurance. The necessary implication is that during the period December 6, 1941 to the date upon which the new program was to be put in effect, property in transit was within the protection of the statute regardless of whether the Maritime Commission was authorized to provide war risk insurance or not. This proviso serves to remove any doubt about the status of the Lahaina. Since the Maritime Commission was authorized to provide war risk insurance, neither a vessel in transit nor her cargo would be covered under the plan to be established. But up to that time both the vessel and her cargo were protected.

The language quoted and discussed above all has reference to the scope of the protection to be afforded *as to the future* under the protection which the defendant was directed to establish. Congress also granted free coverage, without the formalities

of any insurance policy, for loss or damage occurring between December 6, 1941 and the effective date of the insurance plan. The kind of property covered and its location were not separately stated. Instead, the statute refers back to the foregoing provisions by use of the familiar "such property":

"(b) Subject to the authorizations and limitations prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such loss or damage."

It is perfectly clear, we submit, that the quoted language simply granted automatic coverage, for the period prior to establishment of the paid plan of protection, to every kind of property within the protected areas or in transit between them.⁷ Indeed, the coverage was broader, for the proviso excluding property in transit which the Maritime Commission was authorized to insure was applicable *only* to the future period.

In summary, we submit that if ordinary language is capable of expressing intent, it is evident that Congress intended to authorize protection for every conceivable sort of property subject only to geographical limitations. Certainly nothing suggests an intent to exclude any particular kind of property or to limit the recurrent use of the phrase "such property" to anything less than the full significance of the categorical "property, real and personal."

The loss of the Lahaina was covered by the plain language of the statute.

7. Defendant contended in the trial court that the free protection provision of the statute was merely permissive and conferred no rights on plaintiff. This contention also was disregarded by the trial court and will be more fully answered in the reply brief if raised again in this appeal.

A. DEFENDANT'S CONTENTION THAT THE PHRASE "PROPERTY IN TRANSIT" HAS A SPECIAL USAGE WHICH EXCLUDES VESSELS.

In the District Court defendant argued that the language appearing in Clause (2) "such property in transit between any points located in any of the foregoing" did not mean what it seems to, i.e., property which is "en route" as distinguished from property which is "situated," and therefore within the coverage of Clause (1). Defendant's argument was that the words "in transit" are a term of art used in the marine insurance trade with respect to cargoes and not used with respect to vessels. From this premise defendant urged the conclusion that even though a vessel would otherwise be included within the phrase "such property," the use of the words "in transit" indicated that the ordinary meaning of "property" was intended to be narrowed to the sort of property with respect to which this language ordinarily is used in marine insurance policies, namely, cargoes.

1. Technical Usage in the Marine Insurance Trade Is Not Applicable to This Statute.

Defendant relied upon the well-known rule that when a term having a precise and definite meaning in a particular trade is used in a statute dealing with that trade, ordinarily it should be accorded the technical meaning which it has in that trade. We have no dispute with the general rule. Defendant's argument, however, ignores the fact that this statute is not a marine insurance law but rather a general measure applicable to every sort of property, most of it on land.

The marine coverage involved in this statute was an exceedingly small part of the total. Even the "in transit" provisions extend beyond maritime transportation to include rail, air and truck transport.

Defendant sought to connect the statute more closely with insurance by pointing out that before the bill was originally proposed by Mr. Jesse Jones, the Federal Loan Administrator, he

consulted with insurance executives (Senate Committee Hearings, p. 7). The argument ignores the fact that at the time the bill was introduced it did not even purport to cover property in transit but was confined solely to property located in specified geographical areas. The extension of coverage to property in transit came with the Clark amendment following representations by the delegates from Hawaii and Alaska regarding the need for extension of the coverage.

Defendant's argument that the scope of the language "property in transit" should be measured by the technical meaning used in the insurance trade we think is unsound. In the recent case of *Hartford Accident & Indemnity Co. v. Wolbarst* (N.H.) 57 A.2d 151, it was contended that the reference to injuries "accidentally sustained" in a compulsory automobile insurance statute must be construed to exclude an injury caused by a deliberate bumping. The court rejected that argument, saying (p. 153): "The meaning expressly or impliedly given to the word in private policies or contracts independently of statutory requirements is not controlling. The point of view is different." The reasoning involved in this case we think is equally applicable here. Congress was not writing an insurance policy and certainly was not writing a marine insurance policy. The scope of coverage must be determined from the ordinary meaning of the words employed considered in the light of the policy and the purposes of the statute.

2. No Special Usage in the Marine Insurance Trade Which Would Exclude Vessels Was Established.

Defendant sought to establish the point about the special meaning to be attributed to the words "in transit" through the testimony of a number of insurance experts. The District Judge made no finding with respect to the existence of such a special usage in the marine insurance trade (82-84) and in the opinion the court dismissed the evidence on this point as of "little, if any, value" (p. 66).

The fact is that the expert testimony offered did not actually touch upon the real problem. The gist of the testimony was that the term "in transit" ordinarily is used in insurance policies covering cargo and that use of such a word in connection with insurance of the vessel was unusual. The testimony is beside the point. The fact is that cargo customarily is insured on a point-to-point basis, i.e., during the movement. Before and after the movement cargo is subject to a different sort of risk and a marine policy would be inappropriate beyond the duration of the voyage. The vessel, on the other hand, is not customarily insured merely for the transit.⁸

The use of the words "in transit" in connection with cargo thus is entirely consistent with the idea that such words are used to cover the subject of insurance during the period while it is in motion. Such words would be equally appropriate to covering the vessel as well as the cargo, inasmuch as both the vessel and the cargo while in the Continental United States or any of the designated territories would be covered by Clause (a). Clause (b) was intended to and did cover the movement of such property between any of those points.

Nothing in the ordinary use of the words "in transit" suggests that the word "property" must exclude vessels. It is common usage to describe vessels as being in transit.

In *Farwell, Rules of the Nautical Road*, 1944 Ed. p. 380, the following appears dealing with rules governing navigation of the Panama Canal:

"Rule 54. Authorized Speed of Transit: The following speeds shall not be exceeded by vessels *in transit* through the canal: * * *

8. Testimony introduced on behalf of defendant explained the customary use of the term "in transit" in cargo policies and its absence in hull policies as follows: "the term 'in transit' is appropriate for cargo policies because it aptly described the period of movement between fixed points as is customary in insuring cargoes; whereas vessels are insured customarily either for a specified interval of time or by voyage, in which event the vessel is insured in port as well as at sea." (134, 135)

And in *Benedict on Admiralty*, Volume 2, p. 353, the author uses the word "transit" to describe the movement of a vessel in the following language:

"In the case of the Melmay, the vessel was about to *transit* the Panama Canal * * *"

The dictionary definitions are in accord. *Black's Law Dictionary* (Delux Third Ed. 1944) gives the following meanings:

"In Transitu. In transit; on the way or passage; while passing from one person or place to another. 2 Kent Comm. 540-542; *More v. Lott*, 13 Nev. 383; *Amory Mfg. Co. v. Gulf, etc. R. Co.*, 89 Tex. 419, 37 S.W. 856, 59 Am. St. Rep. 65. *On the voyage*, 1 C. Rob. Adm. 338."

Webster's New International Dictionary (2d ed., 1944) cites as an example of the word "transit" "A ferry makes ten transits a day." It also defines the noun as meaning "the action or an instance of passing or journeying across," and the verb "transit" is said to mean "to make a transit across or over; as to transit the Panama Canal."

We quote as follows from the Oxford Dictionary definition of the word "voyage":

"e. spec. In marine insurance: (see quot.). 1848, Arnould, *Marine Insur.* L XII, I, 333. The voyage insured * * *, a technical term, which must be clearly distinguished from the actual voyage of the ship * * * is a *transit* at sea from the *terminus a quo* to the *terminus ad quem* in a prescribed course of navigation * * * which is never set out in the policy." (Vol. X, Part II, 1928 Ed.)"

The usage is similar in judicial opinions. In *Bush v. State ex rel. Dade County* (1939) 140 Fla. 277, 191 So. 515, 523, the Supreme Court of Florida said:

"It is the unquestioned law that where a *vessel* is engaged in the actual carrying commerce between a port of one state and a port or ports of another or foreign ports, as

to each of the ports so visited, by her *she* is considered as being *in transit*, * * *

In *Hays v. Pacific Mail Steamship Co.* (1854), 17 How. (U.S.) 596, 600, 15 L.Ed. 254, the court uses the Latin equivalent of "in transit" to distinguish the activities of vessels having no situs:

"I concur in the judgment. But I concur only in consequence of the facts stated in the declaration, and which are admitted by the demurrer. The material fact is, that the *vessels* were *in transitu*, having no *situs* in California, nor permanent connections with its internal commerce."

The use of the word "transit" in connection with vessels is also common in many maritime labor contracts as illustrated by plaintiff's Exhibit No. 1 (375) which was introduced with the stipulation (114) that it was typical of the usage in many other labor contracts.

To the above noted cases and definitions may be added the weight of Arnould on Marine Insurance and Average (Twelfth Edition, 1939) who states (pp. 532, 533):

"The voyage insured (*viaggium*) is a *transit at sea* from the *terminus a quo* to the *terminus ad quem* in a prescribed course of navigation (*iter viaggii*), which is never set out in any policy, but virtually forms part of all policies, and is as binding on the parties thereto as though it were minutely detailed."

3. Defendant's Own Contentions Show That the Phrase "in Transit" Was Not Used with the Technical Meaning Which It Claims to Have Existed in the Marine Insurance Trade.

The special meaning in the marine insurance trade argued for by the defendant was that the phrase "property in transit" should be understood to refer to cargo. It would be a reasonable question to inquire why the statute did not employ the familiar word "cargo" if that was the intent. Defendant had a ready

explanation for this in the District Court. The reason, it suggested, was that it was intended to cover baggage and personal effects and any other things that might be carried by ships or planes, and that the term "property" *deliberately* was chosen *because it was broader* and appropriate to embrace these additional kinds of property.

By this explanation we think defendant abandoned its argument with respect to the restricted interpretation of the words "property in transit." Obviously it means something more than the restricted meaning which defendant claims should be given to such language in the marine insurance trade. If it means more than cargo, we fail to see the slightest basis for contending that the line of demarcation is to be made at ships.

That it does mean more than cargo we think is evident from the ordinary meaning of the word, from defendant's own explanation of the statute, and from the legislative history of the in transit provision which will be discussed below. It means, we submit, simply that any property which would be covered while situated in the Continental United States or in the Territories would also be covered while in transit between those points.

B. THE MEANING AND INTENT OF THE STATUTE IS PLAIN. THERE IS NO OCCASION TO RESORT TO LEGISLATIVE HISTORY.

We think that the ordinary meaning of the words used in this statute is plain and that Congress intended to cover property of every kind situated in the United States, in the Territories, or in transit between those points. The loss of the *Lahaina* is therefore within the plain language and intent of the statute. There is no occasion in this case for resort to extrinsic aids of construction such as the legislative history of the statute.

1. Legislative Materials Are Resorted to Only When the Statute Is Ambiguous.

We are aware that language has been used in some of the cases suggesting that there is no rule of law by which legisla-

tive materials can ever be deemed irrelevant. See *Harrison v. Northern Trust Company*, 317 U.S. 476, 87 L.Ed. 407, 63 S.Ct. 361.

We do not understand such language to mean that the words used in a statute have no definite meaning. If the statute says white, we do not suppose that any court would even suggest that the statute might be construed to mean black, no matter how clearly the legislative materials might suggest such an intent.

When the meaning of the language plainly includes a particular application of the statute, the courts do not exclude it merely because there may be evidence that Congress had not contemplated that particular situation. In such a case the legislative materials suggesting an intent contrary to the ordinary meaning of the statute are irrelevant for the simple reason that they could not be effective to change the meaning of the statute.

This long settled rule was reaffirmed in the recent case of *Packard Company v. Labor Board*, 330 U.S. 485, 91 L.Ed. 1040, 67 S.Ct. 789. In that case it was argued that supervisory employees, although falling within the ordinary meaning of the word "employees," were not intended to be given the right to organize unions and bargain collectively as were other employees. The court rejected that argument:

"We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law." (p. 492)

And in *Helvering v. City Bank Co.*, 296 U.S. 85, 80 L.Ed. 62, 56 S.Ct. 70, the court said:

"We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used." (p. 89)

In *Barr v. United States*, 324 U.S. 83, 89 L.Ed. 765, 65 S.Ct. 522, it was said:

"But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators. *Puerto Rico v. Shell Co.*, 302 U.S. 253, 257; *Browder v. United States*, 312 U.S. 335, 339, and cases cited." (p. 90)

In *United States v. Missouri Pacific Railroad Company*, 278 U.S. 269, 73 L.Ed. 322, 49 S.Ct. 133, the court said:

"The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction." (p. 277)

See also *Van Camp & Sons Company v. American Can Company*, 278 U.S. 245 at 253, 73 L.Ed. 311, 49 S.Ct. 112.

The only exception to the rule is that when the literal meaning of the language is plainly unreasonable or leads to an absurdity contrary to the spirit of the statute, the courts may treat the language as though it was ambiguous and resort to legislative material to determine whether the irrational result was intended.

The rule was well stated in *Crooks v. Harrelson*, 282 U.S. 55, 75 L.Ed. 156, 51 S.Ct. 49:

"It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this Court in *Church of the Holy Trinity v.*

United States, 143 U.S. 457, 36 L.Ed. 226, 12 S.Ct. 511; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to *justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense.* Compare *Pirie v. Chicago Title & T. Co.*, 182 U.S. 438, 451, 452, 45 L.Ed. 1171, 1178, 1179, 21 S.Ct. 906. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat v. White*, 181 U.S. 264, 268, 45 L.ed. 853, 854, 21 S.Ct. 611." (pp. 59, 60)

And see *Caminetti v. United States*, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192; *United States v. Missouri Pacific R. Co.*, supra at 277. Recent cases announcing a liberal rule with respect to use of legislative materials have not modified this limitation upon their effect. Thus in *United States v. American Trucking Associations*, 310 U.S. 534, 84 L.Ed. 1345, 60 S.Ct. 1059, the court said:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (p. 543)

The plain meaning of the statute in this case leads to no injustice or absurdity. We shall point out in a later section of

this brief that the plain meaning accurately reflects the broad policy and purposes of the statute. Indeed, the contentions made by defendant, if accepted, would lead to discriminations and inequalities without any rational basis.

2. Extrinsic Aids to Interpretation Are Resorted to in Order to Remove Doubts, Not to Create Them.

The defendant attempted in the court below to derive comfort from isolated remarks at Committee hearings or in debate even before the legislation took its final form to raise doubts and then explain them to defendant's purpose. The court stated in *Gemsco, Inc. v. Walling*, 324 U.S. 244, 89 L.Ed. 921; 65 S.Ct. 605:

"The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." (p. 260)

And see *United States v. Dickerson*, 310 U.S. 554, 84 L.Ed. 1356, 60 S.Ct. 1034.

Aids to construction have always been recognized as means to resolve ambiguity and not to create it. In *United States v. California*, 297 U.S. 175, 80 L.Ed. 567, 56 S.Ct. 421, it was argued that a sovereign is presumptively not to be bound by statute. But the court thought the statute broad enough and rejected the argument, saying at page 186:

"Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial."

And see *United States v. Rice*, 327 U.S. 742, 90 L.Ed. 982, 66 S.Ct. 835:

"Statutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a

mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure." (pp. 752-3)

If legislative materials are to be used for the interpretation of the statute, we submit that they should be used, as they always have, as a source from which to determine the purpose and policy which the statute seeks to achieve. See *Radin, Statutory Interpretation*, 33 Cal. Law Rev. 219 at 224.

III. History of the Statute

A. LEGISLATIVE HISTORY IS MORE TRUSTWORTHY AS A GUIDE TO THE GENERAL POLICY OF A STATUTE THAN TO THE DETAILED INTERPRETATION OF SPECIFIC PROVISIONS.

In the normal course of events it is reasonable to anticipate that members of Congress will be familiar with the main purposes of legislation before them. It is a matter of common knowledge that, in the ordinary case, there is no such familiarity with the details.

Courts have long recognized this realistic distinction. Thus, even when legislative debates were deemed improper as aids to construction of *specific* matters, they were considered in ascertaining the *general purpose* of the law and the conditions which it was intended to remedy. *Standard Oil Co. v. United States*, 221 U.S. 1, 55 L.Ed. 619, 31 S.Ct. 502; *Humphrey v. United States*, 295 U.S. 602, 79 L.Ed. 1611, 55 S.Ct. 869; *Federal Trade Com. v. Raladam Co.*, 283 U.S. 643, 75 L.Ed. 1324, 51 S.Ct. 587.

The general purpose of a statute may be a determining factor in interpretation. *United States v. C. I. O.*, U.S., 92 L.Ed. Adv. Ops. 1315, 1320, S.Ct. As the court said in *S. E. C. v. Joiner Corp.*, 320 U.S. 344, 350-351, 88 L.Ed. 88, 64 S.Ct. 120, other rules for deciphering the legislative intent have

"long been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." (pp. 350-351)

And see *Apex Hosiery v. Leader*, 310 U.S. 469, 84 L.Ed. 1311, 60 S.Ct. 982, and *Nardone v. United States*, 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266.

B. THE CIRCUMSTANCES IN WHICH THE STATUTE WAS ENACTED DISCLOSE THAT ITS PURPOSE WAS TO ESTABLISH A BROAD PROGRAM OF WAR RISK PROTECTION FOR THE PUBLIC AT THE PUBLIC EXPENSE.

We shall consider here the circumstances and motives which led to the first attempt to give protection against war damage.

Courts have long recognized that an understanding of the conditions at the time a statute was enacted furnishes a valuable guide to the legislative intent; for the problems which give rise to a law point to its general purpose and policy. *Smith v. Townsend*, 148 U.S. 490, 496, 37 L.Ed. 533, 13 S.Ct. 634; *Church of the Holy Trinity v. United States*, 143 U.S. 457, 36 L.Ed. 226, 12 S.Ct. 511; *Apex Hosiery Co. v. Leader*, supra; 2 *Sutherland, Statutory Construction* (3rd ed., 1943), Para. 5002.

As the court said in *United States v. C. I. O.*, U.S., 92 L.Ed. Adv. Ops. 1315, S.Ct.:

"There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged." (L.Ed. at 1320)

This Court may take judicial notice of the emergency with which the country was confronted when, on December 7, 1941, it was plunged suddenly into war by the attack on Pearl Harbor. There was widespread fear of further attack at any moment, particularly along the Atlantic and Pacific Coast areas. Public morale and the orderly prosecution of the war effort were

thought to be adversely affected by concern over the prospects of uncompensated property damage (Senate Report No. 1012 (on S. 2198), 77th Cong. 2d Sess.).

Recognizing the need for some immediate relief, the Federal Loan Administrator, Jesse H. Jones, publicly announced, on December 13, 1941, that reasonable financial protection would thereafter be afforded to property owners in the United States against enemy attack without charge or premium. By a similar statement, made on December 22, 1941, that protection was extended to property owners in Alaska, Hawaii, Philippine Islands, Puerto Rico and the Virgin Islands. That protection was to be furnished through a corporation known at first as War Insurance Corporation but later as War Damage Corporation, the defendant in this action.

Mr. Jones later explained to Congress that he considered the press releases to constitute blanket insurance policies (Sen. Com. Hearings, pp. 6-7) and that "Everybody now is reasonably covered by the \$100,000,000 provided" (Sen. Com. Hearings, p. 8; House Com. Hearings, p. 26).

It is apparent that the scheme of protection set up by the press releases was a temporary expedient. In January 1942 bills were introduced in Congress, sponsored by the Administration through Mr. Jones, to put the whole matter on a firm basis.

In the light of certain contentions made by defendant in the District Court, it is necessary to examine the scope of protection afforded under these press releases in some detail.

1. Vessels Were Included in the Original Insurance Program Published in the Press Releases.

In the District Court defendant argued that the press releases were not intended to apply to vessels. From this ill-founded premise defendant spun out a web of argument that the statute later enacted was a direct outgrowth of the press releases and, therefore, it too was not intended to apply to vessels.

The press release announced that defendant had been created "to provide reasonable protection against losses resulting from enemy attacks which may be sustained by owners of property in continental United States through damage to or destruction of buildings, structures and personal property, including goods, growing crops and orchards. Pending completion of details, any such losses will be protected from December 13, 1941, up to a total of \$100,000,000. Accounts, bills, currency, debts, evidences of debt, money, notes, securities, paintings and other objects of art will not be covered. For the time being no premium will be charged for this protection, and no declaration or reports required unless there is a loss." (Sen. Com. Hearings, p. 6)

Defendant's contention that the press release did not cover vessels, even assuming them to be in the United States, rested upon two equally startling arguments.

The first seeks to apply the maxim *eiusdem generis* to the language "buildings, structures and personal property including goods, growing crops and orchards." "Personal property," it was claimed, was restricted in meaning by the preceding words "buildings, structures," so that it meant personal property of the type "associated with buildings and structures." Apparently troubled by the express inclusion of crops and orchards, defendant suggested the true meaning to be "personal property of the type usually found on land."

We doubt that the time-honored rule of construction *eiusdem generis*, has ever before been tortured into anything like this. As we understand the rule of construction it applies only to a situation where a series of related specific items are set forth followed by general language which *includes the specific items* as well as others. In such case the general language may, in the absence of other indications of intent, be interpreted to apply only to items like those specifically set forth. 2 *Sutherland, Statutory Construction*, 3rd Ed. 1943, §4909.

The obvious fallacy of defendant's argument lies in attempting to apply the rule to general language which includes none of the specific items. "Personal property" is not a generic term including *realty*. It also ignores the specific exception of objects of art and intangibles, which certainly would be unnecessary if defendant's argument were correct. This contention of defendant would make the press releases, intended to "allay fear," a cynical fraud on the public.

The second argument is that vessels were not covered because Mr. Jones (when he made the announcement) was not concerned with ships. This theory about what Mr. Jones had in mind rests upon his own later assertion (Sen. Com. Hearings, p. 6) that the press release was called forth because of the widespread fear of bombing, particularly along the West Coast and the Atlantic seaboard. Obviously the argument proves too much. By that criterion of interpretation, the only property covered would have been along the coast and it would have been covered against bombing only. No one has even suggested that the protection was so restricted and the argument plainly is without merit.

2. Scope of Protection Available Under the Press Releases at the Time Congress Commenced Work on the Proposed Law.

The coverage available under the press releases throws light upon the meaning of the statute. We think it is evident that vessels are personal property within the meaning of the press release and that they do not fall within the exceptions made with respect to intangibles and objects of art. It follows, then, that a vessel situated in the United States, e.g., in San Francisco Bay, or in the designated Territories was within the protection afforded by the press release.

The press releases did not protect the *Lahaina* because:

- (1) She was lost prior to the effective date of coverage, and
- (2) she was neither in the United States nor in a territory.

The situation as it stood when Congress took up the new

legislation was this: A broad program of free coverage had been instituted which covered loss from enemy attack in the United States and Territories of every possible species of property with the following exceptions :

(a) Whatever species of real property were not included within the meaning of "buildings" and "structures," e.g., a forest.

(b) Certain kinds of personal property, i.e., intangibles and objects of art, which had been expressly excepted in the press release.

(c) All property prior to the effective date of the press release.

We think it is a significant indication of the general purpose and intent of Congress that the statute eliminated *all* of these gaps in coverage. Under this statute *all* property, real and personal, situated in the United States and designated Territories was covered retroactively to December 7, 1941.

What Congress did in extending the scope of the protection assured speaks louder and more eloquently than words. The act which it adopted extended full coverage without distinction or exception based on the character of the property or the availability of insurance from other sources.

Congress also extended the protection of the statute into new ground by covering "property in transit." Defendant argues that the Congress, which was then in the process of expanding coverage in the United States and the Territories to its ultimate limit, intended to cover only cargoes and personal effects in transit and to exclude ships. No rational ground appears for the distinction. The policy and purpose of Congress is clear; and, in extending coverage to the "in transit" situation, Congress chose the same broad word, "property," by which it had extended complete coverage in the United States and the Territories.

There is no basis for contending that Congress used the term "property" in the "in transit" provision, intending a more restricted meaning than was intended when the same word was used with respect to property situated in the United States and the Territories.

C. THE DOMINANT PURPOSE OF THE STATUTE.

The record of what was said and done in the proceedings on this statute plainly establishes one basic principle. Loss from enemy attack was an incident to the common war effort and no individual should bear a disproportionate share of the war cost.

1. The Basic Purposes Indicated by Amendments Extending the Coverage.

Senate Bill 2198 was introduced on January 14, 1942 at the request of Mr. Jones, the Federal Loan Administrator. The original form of that bill would not have materially changed the program which had been set up under the press releases. The bill provided *only for the future* and provided for coverage on *tangible property situated in the United States and certain Territories*, on terms and conditions to be established by the defendant.

The bill passed through Congress in short order. Hearings were held before the Senate Committee on Banking and Currency on January 27, 28 and 29, and the bill was reported out of Committee with a proposed amendment in the nature of a substitute bill on February 2, 1942 (Senate Report No. 1012, 77th Cong., 2nd Sess.). On February 3, the bill was debated in the Senate and passed in the form reported (88 Cong. Rep. 955-968).

In the meantime, on February 2nd the House Committee on Banking and Currency opened hearings on a companion bill (H. R. 6382). As the Senate Committee had already reported out the Senate Bill with changes, the House Committee took up the Senate Bill as reported, and House Report 6382 was abandoned.

Hearings were held by the House Committee on Banking and Currency February 2, 3, 4, and 5. The bill was reported out with amendments on February 6 (House Report No. 1752, 77th Cong., 2d Sess.). On March 2, 1942 the bill was called up in the House, debated, amended and passed (88 Cong. Rec. 1843-1865).

The Conference Report on the disagreeing votes of the two Houses was adopted in the Senate (88 Cong. Rec. 2653-4) and the House (88 Cong. Rec. 2656-2661) in short order.

In the course of this brief passage through Congress extensions were made in the coverage of the bill which indicate clearly, we think, the basic intent of Congress to compensate all war damage without any distinctions. The significant changes in the course of passage may be summarized as follows:

(a) The provision which would have limited coverage to "tangible" property was abandoned by an amendment introduced during the debate in the House (88 Cong. Rec. 1859-1860). The only distinction which had ever been made as to the *kind* of property thus disappeared.

(b) The coverage of property situated in certain designated Territories was extended to include other areas which might be determined by the President to be under the dominion and control of the United States.

(c) Protection was extended to property in transit between any of the geographical areas which were covered in the bill. The precise meaning of this particular extension is, of course, the subject of this suit.

(d) An amendment which would have limited to \$15,000 the coverage to be granted without premium (leaving excess to be covered by premiums) was adopted in the Senate Committee but later was rejected in the House.

(e) An amendment was adopted in the House Committee giving retroactive coverage without premium back to the date of the attack on Pearl Harbor.

(f) An amendment was adopted in the House debate to cover international bridges on the plea that all property should be covered without distinction (88 Cong. Rec. 1861).

The only changes indicating an intent to narrow the scope of coverage were the following:

(a) It was thought that damage in areas seized by the enemy, such as the Philippines, should be handled by a separate law and at Senator Taft's insistence an amendment was adopted by which it was intended to authorize the defendant to make territorial exceptions to the coverage (see Sen. Com. Hearings, pp. 31, 92, 94-5; Senate Committee Report, p. 3).

(b) An amendment drafted by Admiral Land was adopted in the House Committee which would have excluded from the "in transit" clause any property which the Maritime Commission was authorized to insure. This would, of course, have excluded both vessels and cargoes. In the conference, however, this limitation was amended and made applicable only to the coverage which would be provided in the future. It thus expressly recognized that during the retroactive period the bill covered property upon which the United States Maritime Commission was authorized to write insurance.

The bare fact that these changes extending coverage were made is convincing evidence that Congress intended to go the whole way in covering war damage without distinctions as to the kind of property or extrinsic matters such as the availability of insurance.

2. The Basic Purpose Is Further Emphasized by Statements Made in the Congressional Proceedings.

There never was any question about the basic purpose and philosophy of the Act. That purpose was forcefully stated in the report on the bill by the Senate Committee on Banking and Currency:

"The necessity for some assurance of protection seems not subject to question. It appears to be proper that the

protection against such losses should be undertaken by the Government for the reason that such coverage, the extent and probability of losses being unpredictable, cannot satisfactorily be assumed by private insurance carriers. Also it seems appropriate for the Government itself to undertake the program because the cost of such protection—pertaining solely to catastrophic results arising from a common national cause—should be borne by the Nation at large just as the cost of a battleship or of a bomber would be, rather than that such cost should be borne by the comparative few who might be immediate victims. Coverage has been restricted to damage resulting from enemy action for the reason that only in this situation is the property owner without recourse and entirely unable effectively to protect his interests.” (Senate Report No. 1012, 77th Cong. 2d Sess., p. 3)

Throughout all the proceedings in the committees and on the floor the underlying purpose never varied. It was the basis for the original press releases, which Mr. Jones described as covering everybody with a blanket policy (House Com. Hearings, p. 26; Sen. Com. Hearings, p. 8). Mr. Jones pointed out: “To us who have studied it, it seems very, very simple. If special war protection is to be provided it should be by way of government coverage.” (Sen. Com. Hearings, p. 9). Mr. Jones recognized an obligation upon the government to make good such losses to property (Sen. Com. Hearings, p. 14).

Other committee members and Congressmen expressed the same view. Senator Maloney, a member of the Senate Committee and Floor Manager of the Bill, said:

“I think that if there are bombings and there are great losses on either of the coasts all the people of the country should share the burden, and I think at this moment that the only way we can get a proper premium is by sharing the cost, and that it should come only through taxation.” (Sen. Com. Hearings, pp. 16-17).

Mr. Patman, a member of the House Committee, said:

"Mr. Jones, I am in accord with the view that since our Government has declared war on other countries, if any damage is caused by the public enemy it is a governmental responsibility (House Com. Hearings, p. 47).

Mr. Smith, a Committee member, said:

"I do not see upon what principle you can exempt any amount on this property in certain instances, whether it is for a temporary period or over a long period of time. It seems to me we should have that law simply covering losses *in toto*." (House Com. Hearings, p. 96).

Mr. Sacks, another Committee member, said:

"I incline to the theory that the Government owes protection to its citizens against enemy action regardless of the amount." (House Com. Hearings, p. 51).

In the Senate debates, Senator Pepper said:

"I cannot see anything wrong, I confess, with the principle that if the individual citizen loses his home or business because of a bombing attack as a part of the war in which the whole country is engaged the loss should not fall disproportionately upon him." (88 Cong. Rec. 960).

In the light of this basic philosophy, the frequent assertion that everybody was covered obviously should be taken to mean exactly what was said. Thus the Senate was advised by the Floor Manager of the Bill:

"So far as I can see, it goes all the way in providing limited⁹ protection against enemy attacks for the tangible property of Americans during this wartime period." (88 Cong. Rec. 958).

9. The Bill then contained a \$15,000 limitation and covered only tangible property.

And in the consideration of the bill in the House repeated statements are found to the effect that "all real property and tangible personal property would be protected" (88th Cong. Rec. 1846); that coverage would be given to "everybody on everything" (id., p. 1848); that "all should share the risk" (id., p. 1849); and stand the losses equally (id., p. 1851).

These statements and numerous others to like effect reveal the underlying principle that no individual should bear a disproportionate share of the war cost but rather that all of the people should share equitably in the losses sustained by any of them as the result of enemy action. The nation should and did undertake the burden of the individual's loss. All property owners shared in the benefit and all taxpayers shared in the burden. Such a principle does not permit a construction of the statute to exclude a particular kind of property. Such discrimination and inequity of treatment are entirely alien to the intent of Congress.

The defense in this suit, however, and as we understand it, the judgment of the trial court were predicated upon the theory that Congress intended to exclude a particular class of property.

Such a departure from the general purpose of the Congress will not readily be declared by a court unless the evidence of such intent is quite clear. That there is no such clear indication of an intent to exclude vessels or any other particular class of property we think is shown both by the above statements of intent and by the detailed discussion of the in transit provisions which follows.

D. PROCEEDINGS ON THE PROTECTION OF "SUCH PROPERTY IN TRANSIT" SHOW THAT CONGRESS INTENDED NO EXCLUSION OF SHIPS.

We turn now to the proceedings particularly related to the "in transit" clause. Defendant's argument and the trial judge's opinion relied on inferences drawn from these proceedings. The contention of defendant was based on two considerations:

First, the "in transit" extension was adopted at the urging of Delegates King and Dimond of Hawaii and Alaska, respectively. These gentlemen are said to have been concerned only with water-borne cargo. From this it was claimed that the broad language appearing in the statute should be restricted to exclude vessels.

Second, there was strong opposition in the Committee hearings to any extension of coverage which would overlap the Maritime Commission's authority to write war risk insurance on both cargoes and vessels. Although defendant conceded duplication with respect to cargoes (357), it was claimed that this opposition requires a narrow interpretation of the "in transit" clause which reinforces the first argument and makes reasonable the supposed intent to exclude vessels.

1. Proceedings in the Senate Committee.

(a) TESTIMONY OF DELEGATES KING AND DIMOND.

Mr. King, the Delegate from Hawaii, testified briefly before the Committee (Sen. Com. Hearings, pp. 25-31), and presented a written statement requesting three amendments. In that statement he pointed out that "personal property" was covered during its transfer between points in the continental United States but not in a transfer to the Territories. The statement also squarely raised the question of policy about whether protection should be given by this law or through some other agency and concluded:

"In any case personal property in transit should not lose the protection extended to such property both at its point of origin and at its destination.

"I ask your support, therefore, of the amendments I propose to offer to the pending legislation which will extend its benefits to intangible as well as tangible property and *all forms of property while in transit.*" (Sen. Com. Hearings, p. 27)

And in his oral request for amendment Mr. King used the same language:

"So, I should like to ask the committee to consider making the bill effective as of the calendar date December 7 to include coverage for *all forms of property in transit* * * *" id., p. 26)

At several points in his explanation of the necessity of "in transit" coverage Mr. King referred to "goods" in transit and emphasized the dependence of Hawaii upon water-borne goods and commodities. He also said that cargo insurance rates had jumped and that the Maritime Commission had not yet exercised its authority to provide war risk insurance on cargoes. He did not know whether they had done so with respect to vessels (id., p. 31).

Mr. King was followed by Mr. Dimond, the delegate from Alaska (Sen. Com. Hearings, pp. 31-35). Mr. Dimond explained Alaska's dependence upon water transportation and endorsed Mr. King's requests. He added that the Maritime Commission had not yet acted to make war risk insurance available with respect to Alaska because commercial rates were not considered too high. Like Mr. King, he referred in his argument to "goods," "products," and "property" in the course of transportation. His formal request for amendment was:

"What I ask for with respect to Alaska is that we be accorded in the Territory, and necessarily on the high seas when en route between the Territory and the States, for our property the same protection that is given to the people of the states when their property is in course of transportation from one state to another." (Sen. Com. Hearings, p. 33)

And again he said:

"Whatever products are protected under this insurance policy in the states and in the territories should be protected just as much on the high seas between the states

and the territories, whether it is petroleum products, or salmon, or sugar and pineapple which are produced in Mr. King's territory, or *what not*." (id., p. 33)

The trial judge in his opinion summed up the testimony of Messrs. King and Dimond by saying that each urged amendment to protect *goods* in transit (68). As we have noted, their proposals were stated in more inclusive language.

Defendant argued, and the District Court agreed, that the delegates were concerned about cargoes and that the amendment later offered by Senator Clark should be restricted to exclude vessels.

We think the inference is unjustified. It is doubtless true that the delegates were deeply concerned about movement of goods and commodities by water. The ship is just as essential to the movement as the cargo. That was made clear by Mr. Dimond's testimony that freight rates, as well as cargo insurance rates, had jumped because of the increased risk.

Both delegates referred to the discrimination arising out of the protection given to property moving between two states but denied to a similar movement between a territory and a state. We respectfully suggest that the delegates would have been quick to deny that they proposed a discrimination between the ship and its cargo.

Indeed, Mr. King pointed out that since property was insured at the point of origin and also the point of destination, it was unreasonable to have a "haitus" in coverage during the dangerous movement. The reasoning applies equally to the vessel and its cargo.

Certainly it is clear that there was no indication of any desire to exclude vessels. The formal proposals made by the delegates, and the reasons for them, would include vessels as well as other property. The only basis for a narrower construction is the inference that since, in their discussion, they dwelt on water-borne goods and commodities they really had in mind such cargoes only.

Such an argument proves too much. It also proves that "property in transit" refers only to *water-borne* cargo. But Senator Clark did not so understand. Commenting on Mr. Dimond's formal proposal, he said:

"You get into a very peculiar situation there unless you do afford this extended protection to goods in transit either by *airplane* or by steamship." (Sen. Com. Hearings, p. 33)

Such reasoning also would limit the meaning of "property in transit" to cargoes. But when Senator Maloney, the Floor Manager for the bill, presented it to the Senate he pointed out that it "also provides for coverage of the personal effects of people travelling on such vessels" (88 Cong. Rec. 958). Seeking, apparently, to make a virtue out of necessity, defendant explained this embarrassing deviation from its present contention by arguing that the word property was used instead of cargo because that word was broader and would cover baggage and personal effects.

We find no appeal for coverage of these items. They were ignored by the delegates along with vessels. If "property in transit" means something more than the sort of goods particularly referred to by the delegates, and defendant asserted that it does, then how can the line be drawn at vessels?

(b) THE CLARK AMENDMENT.

Whatever the desires of the territorial delegates may have been, the fact is that Senator Clark of Idaho proposed a committee amendment to the Senate Bill, incorporating the provision about which this suit revolves (Sen. Com. Hearings, p. 73). After commenting on the limitation of the protection under the Bill to property situated in the United States, he proposed an amendment to insert the words "*or in transit between*" so that the pertinent portion of the Bill then would have read:

"Such protection shall be limited to property situated in

OR IN TRANSIT BETWEEN the United States, including the several states, etc."

The provision in that form leaves no shadow of doubt that the property to be insured when in transit between the United States and its territories and possessions was the identical property to be insured within the United States. The word "property," being used in the provision only once, can have one meaning only; it must be conceded that that meaning in the United States included all forms of property, specifically ships as well as other carriers; and it must, therefore, have the identical meaning elsewhere than in the United States. Certainly no inference of a changed intent can be drawn from the fact that the form of the statute later was recast, without explanation into its present form which, alone makes possible the argument that "property" in transit means something different than "property" in the United States.

It cannot be assumed that Senator Clark or the other members of the Committee were unfamiliar with the language or its proper use. It would have been perfectly simple, had Senator Clark or the Committee so intended, to have restricted the scope of coverage to cargoes or goods or merchandise when in transit outside of the limits of the United States or its Territories; instead, the Senator and the Committee used the broader term property, thus rejecting the narrower terms.

It will be noted, also, that the intent of the Senator and the Committee was to give to the War Damage Corporation the broadest possible latitude, so that to use the words of Senator Clark "that would merely remove the limitation, so that you could go into this question of *shipping*." (Sen. Com. Hearings, p. 73).

With respect to defendant's contentions about the opposition to overlapping the Maritime Commission, it should be noted that the Senate Committee was under no misapprehension about what it was doing in adopting the Clark amendment. Im-

mediately following Senator Clark's proposal of the amendment, the following exchange took place:

"Senator Maloney: Are you certain under existing law the Maritime Commission is permitted to insure cargoes?

"Mr. Jones: That is my understanding. At all events, I think it should be done." (Sen. Com. Hearings, p. 73)

Later in the hearings Senator Brown again raised the question of duplication.

"Senator Brown: * * * You are satisfied that you should not touch maritime insurance at all in this bill?

"Mr. Jones: No; I am not. I think we should have the authority to cover these things in transit between Alaska and Hawaii and the mainland in cooperation with the Maritime Commission.

"Senator Maloney: You have that authority with the adoption of the Clark amendment.

"Senator Brown: I did not know about the Clark amendment.

"Senator Maloney: It has not been adopted, but it was informally accepted, I think * * *" (id., pp. 96-97)

"Senator Brown: I think there should be coordination between you people in that respect, so that we do not authorize two agencies to do the same thing.

"Mr. Jones: We do not want to do that, and we do not propose to give anybody insurance who can buy insurance anywhere else. If it is available to them, let them go get it.

"Senator Maloney: *I would like to say, Senator Brown, that I think the proposal made here would create some duplication.*" (id., p. 98)

Senator Brown, at least, seems to have assumed that the "in transit" problem covered damage to *ships*, for he replied to Senator Maloney:

"It seems to me that we are getting into that position, but I have thought all along that there are two kinds of

risks that are involved—the ordinary risk of damage by storm, collision, and so on and so forth, and then the risks that are due entirely to enemy action. It is not always easy to draw the distinction. As I said last Monday, these *sinkings* that have occurred off Norfolk or off Cape Hatteras by the German submarines are clearly the result of enemy action. But then we had an accident out there in which *two ships collided. One of them sunk and the other was badly damaged*, due to the fact that under Government direction they were running without lights. Could that risk be provided against by ordinary insurance? I doubt it.” (id., p. 98)

The Senator clearly had in mind the damage to the *ship* in the above remark. Mr. Hamilton, general counsel for the R.F.C. and Mr. Jones’ aide throughout the hearing, must have thought ships were involved because he referred to vessels as well as cargo in the following:

“Senator Brown: It seems to me that Mr. Hamilton should consult with the Maritime Commission and be sure that they do not cover the same subject matter.

“Mr. Hamilton: They do, Senator. I can answer that question now. They are writing insurance on *American bottoms* and on cargoes carried in American ships, using that \$40,000,000 fund. They have been writing it *only about a month*, I believe.” (id., p. 98)

“Senator Taft: The bill is broad enough to cover *marine insurance*, unless we do something else about it.

“Mr. Hamilton: Not without the Clark amendment, Senator, because the authority is limited to property situated in the United States.” (id., p. 98)

Senator Brown, again, was concerned with the insurance of vessels in the following exchange:

“Senator Brown: I would like to see you do the *whole job* instead of having the Maritime Commission get into it, too.

"Mr. Jones: My thought about that is not to take their place, but if anybody wants this insurance, let him come and ask us for it, and let him pay for it, unless the Maritime Commission can take care of it."

* * * * *

"Senator Brown: Well, it just seems to me that you are going to have duplication of inspectors, surveyors, and so on, and so forth. You will be inspecting *bulls*, and so forth, and the Maritime Commission will also be doing it." (id., p. 99)

The preceding material indicates that duplication was not considered desirable. But it must be remembered that at this stage the bill was purely prospective in operation. Mr. Jones' testimony in the last quotation thus indicates that although *authority* to duplicate was being given, it was intended that insurance would only be issued when the Maritime Commission did not make war risk insurance available. It is evident that the Committee members fully understood that adoption of the Clark amendment would result in duplication of authority both as to vessels and cargoes. Since the Clark amendment was adopted a few minutes later (id., p. 100) it is evident that the Committee deliberately chose to authorize duplication.

And so, to summarize the then condition of the Bill, the Clark amendment had removed all limits with respect to the authority of the corporation to issue war risk insurance with respect to property located in or passing between the United States and its territories and possessions; with the understanding that the corporation would not issue policies of insurance or afford protection either to ships or cargoes where it was obtainable from the Maritime Commission.

That situation reinforces the plain meaning of Section 5g, that property "in transit" included all property, whether cargoes, ships or whatnot, passing between the United States and the specified territories and possessions.

2. Proceedings on the Floor of the Senate Show There Was No Intention to Exclude Vessels.

Counsel for the defendant pointed to only one quotation in the proceedings before the Senate, and the Court adopted that single statement, in support of claim that only cargo of the vessel and not the vessel itself constituted property in transit. The reference is to a statement by Senator Maloney as follows:

"It made provision in the language of the bill for the War Damage Corporation to afford protection to the cargoes of vessels traveling between the United States and our Territories and other places. That not only means that the cargo of the vessel itself could be insured—and I may say parenthetically that the Maritime Commission has certain moneys and authority under existing law to provide like coverage—but it also provides for coverage of the personal effects of people traveling on such vessels." (88 Cong. Rec. 958)

It is respectfully submitted that Senator Maloney was not undertaking to define the full scope and application of the bill when he said that the cargo of the vessel could be insured and also the personal effects of people traveling. On the contrary, he generalized by stating immediately thereafter

"So far as I can see, it goes all of the way in providing limited protection against enemy attacks for the tangible property of Americans during this wartime period."

And his reference to cargoes and personal effects were merely examples of that application; for, concededly, the "in transit" clause applied equally to personal property carried by plane or other modes of transportation, and yet Senator Maloney did not mention it. In like manner, Senator Maloney followed the quotation relied upon by a statement, "the Bill authorizes the War Damage Corporation to cover crops in the field." It will not be claimed, we assume, that the protection of the Act was limited to crops in the field.

Nowhere in the presentation of the bill or in the debates on the floor of the Senate was the suggestion ever advanced that vessels, planes or other carriers should be the one class of property excluded from the protection afforded by the law. Nowhere in those debates or discussions is it suggested that the word "property" should be treated as having one meaning within the territorial limits specified, and another when passing between them.

And so, it is submitted that in all of the proceedings up to the moment when the Senate Bill passed to the House, there was complete adherence to the policy set forth in the Senate report that the cost of the protection afforded should be borne by the nation at large, rather than the comparative few who were the immediate victims.

That policy is clearly as applicable to the carrying vessels as to the cargo or personal effects carried therein, the language of the statute covers it, and no single suggestion of its exclusion can be found in the proceedings.

3. The Proceedings in the House Committee Show That It Considered the Phrase "Property in Transit" to Include Ships.

Mr. Jones substantially repeated what he had said in the Senate hearing. We would not dwell on this but for the fact that the District Court stated in the opinion (71) that Mr. Jones here expressed the opinion that goods in transit would be insured but not the vessel. This was a misunderstanding of Mr. Jones' testimony as can readily be demonstrated.

Mr. Williams asked the question:

"It would not cover the vessel itself, would it—or would it?"

"Mr. Jones: I do not think so; no. We would insure the merchandise in the vessel." (House Com. Hearing, pp. 21-22.)

The true meaning of the question and answer was that *foreign* vessels would not be insured. This is readily demon-

strated when read in the context. Mr. Williams had just asked a series of questions about foreign nationals and the immediately preceding question was:

"Well, would this cover insurance of goods in foreign vessels?

"Mr. Jones: Yes; it could, because a good many of those vessels are foreign vessels, but they are friendly foreign vessels." (id., p. 21)

The very fact that a committee member thought it worth while to inquire whether *foreign vessels* were to be covered indicates plainly enough that it could not have been understood that *American vessels* were excluded.

There was also placed in the record a statement by W. R. Boyd, of the American Petroleum Institute, pleading that coverage be given to oil tankers (id., p. 58).

The question of duplication between the Maritime Commission and War Damage Corporation was raised again and resulted in an amendment offered by Mr. Lynch, which was adopted without objection (id., p. 43).

The amendment would have added the bracketed words:

"(2) [When adequate work (war) risk insurance at reasonable rates is not available in the private insurance market or with the United States Maritime Commission] to such property in transit * * *"

Later in the proceedings an amendment suggested by Admiral Land, of the Maritime Commission, was substituted for the Lynch amendment (id., pp. 88, 93). With that change the limitation took the form of a proviso:

"That such protection shall not be extended to property in transit upon which the United States Maritime Commission is authorized to provide marine war risk insurance." (id., p. 93)

This amendment, carved out of the authority of the War Damage Corporation, to provide war risk protection for prop-

erty in transit, American ships, the cargoes carried therein, and the personal effects of those aboard because the Maritime Commission was authorized to provide war risk insurance on all of these.

While in the House Committee the bill was also amended so as to extend protection to losses from enemy attack, which "may have heretofore resulted." The purpose of that amendment, as the trial court correctly stated in its opinion, was to the end that *all* persons without war risk insurance for *past* losses would be protected until the Government insurance plan was worked out. And thus the bill was extended to provide protection without premium for the period from December 7, 1941 to a date determined by the Federal Loan Administrator, but in no event later than July 1, 1942.

In addition, it should be noted that the House Committee deleted the \$15,000 limitation which had been added in the Senate Committee.

4. In the Proceedings on the Floor of the House Repeated and Explicit Statements Show That the Term "Property in Transit" Included Ships.

Mr. Steagall, Chairman of the House Committee, undertook to present the bill to the House. Early in the debate, the following exchange took place (88 Cong. Rec. 1847):

"Mr. White: Does this War Insurance Corporation apply to cargoes and *ships* on the high seas?

"Mr. Steagall: *Yes*; under certain conditions.

"Mr. White: Then the Government is taking a direct loss in all of the torpedoings of cargoes and oil tankers and things like that under the operation of this act?

"Mr. Steagall: I yield to the gentleman from Virginia [Mr. Bland], who will make the explanation that I was going to make to the gentleman.

"Mr. Bland: Things like that are being taken care of under the war-insurance bill, which was extended today. I have just put into the basket a report on the amendment

to that bill, which covered every phase of the marine liability and risk.

"Mr. Steagall: The gentleman from Virginia has stated the situation correctly, but this bill provides that kind of insurance only where the Maritime Commission is not authorized by law to render that service. There would be no conflict. The Corporation would only come in when the Maritime Commission could not render the service.

"Mr. Bland: In other words, *if there should be a case which is not covered by the maritime-insurance legislation, then this takes care of that.*

"Mr. Steagall: *That is quite correct.*

"Mr. Bland: Although we do not conceive just what it will be; but it takes care of it.

"Mr. Steagall: That is quite correct."

It was the understanding of both Mr. Bland and Mr. Steagall that the bill in the form in which it then appeared accorded to the War Damage Corporation full and complete authority to insure all ships and cargoes to the fullest possible extent, so that if at any point the authority conferred on the Maritime Commission was insufficient to permit it to provide the necessary protection, then the War Damage Corporation itself could do so. It follows, then, that subject to the proviso adopted by the House Committee, the War Damage Corporation had full and complete authority to insure vessels as well as cargoes; and the members of the House of Representatives so understood.

Mr. Steagall stated at the very inception of his comments, that:

"all real property and tangible personal property would be protected under the provisions of the Bill and the law would be retroactive to cover all such damages as have occurred since the 7th day of December." (88 Cong. Rec. 1846)

In making that statement, Mr. Steagall indicated no exception whatever to the broad and all-inclusive protection guaranteed. No suggestion was made that of all forms of property, only vessels were excepted.

Mr. Ploeser pertinently asked the Chairman of the Committee

"Was it the intention of the Committee to go from a blanket form of insurance, in which every citizen owning property was provided in unlimited amount up until now, as I understand it, to an actual contract of normal insurance business for war risk?"

and Mr. Steagall replied

"That is correct. The gentlemen will understand that we could not go back and contract when people suffered damages such as the people of Hawaii on the 7th of December. That is behind us, and nothing can be done about it, except what we can do retroactively." (id., 1847)

Is it conceivable that the Chairman could assure the House that a blanket form of insurance was provided for every citizen owning property if, in fact, those owning vessels were alone unprotected? Can there be any doubt that it was the intent to cover every form of property without exception, when in response to a question by Mr. Cox concerning the extent of the protection to property owners the Committee Chairman answered:

"To everybody on everything if the plan decided upon goes into effect, up to the time the permanent plan becomes operative." (id., 1848)

Understanding of the House members was plainly indicated by Mr. Ploeser in another remark, after he had reviewed the history of the bill, saying:

"The Senate version of the plan went so far as to cover *all properties in transit*, which included *any* marine risk, ocean-going marine risks, as well." (id., 1849)

Mr. Steagall's explanation, as Committee Chairman and Floor Manager, is of course entitled to particular weight since it is upon such statements that Congress acts. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125, 86 L.Ed. 726, 62 S.Ct. 525. In *United States v. St. Paul, M. & M. Ry. Co.*, 247 U.S. 310, 62 L.Ed. 1130, 38 S.Ct. 525, the court reasserted the rule against use of debates, but pointed out a distinction:

"But the reports of a committee * * * and *statements made by the committee chairman in charge of it, stand upon a different footing* and may be resorted to under proper qualifications." (p. 318)

5. The Proceedings in the House After Amendment of the Bill in Conference Show That the Bill as Finally Adopted Extended Full Protection to Ships as Well as Other Property During the Free Period.

In the conference on the disagreeing votes of the Houses, a significant change was made. The House proviso which would have excluded any property on which the Maritime Commission was authorized to write war risk insurance was modified to become effective only after the new program for the future was established.

The retroactive coverage was thus freed of the limitation.

Mr. Steagall's explanation of the present status of the bill, after the conference report, is thus highly significant. We have pointed out that before the modification of the House proviso he had explained that cargoes and ships were covered except as limited by that proviso. Now he stated the coverage without qualification.

Mr. Smith of Ohio, a member of the House Committee, but not chosen as one of the Managers on the part of the House to represent it at the Conference hearing, asked Mr. Steagall the following question:

"Under the temporary arrangement until the contracts are written, say July 1, are the *sinkings* that are taking place at the present time covered by the temporary arrangement?"

Mr. Steagall answered "yes," whereupon Mr. Smith said: "This takes care of the property alone?", to which Mr. Steagall replied, "*The property entirely.*" (88 Cong. Rec. 2658).

Defendant, as usual, suggested that the word "sinkings" had a special meaning for the purpose of the act and referred only to cargoes.

A little later in the debate Mr. Smith again raised the same question, as follows:

"The question was raised seriously in the committee as to whether it might not be advisable to provide for the payment of premiums on property which might be lost up to the time of the writing of insurance contracts. At that time we were not thinking of any damage except that which occurred at Pearl Harbor. The committee for some reason took no action on requiring such premium payments. Since that time we have had an *immense amount of sinkings*. I would like to have an expression from the gentleman from Alabama as to whether we may not have made a mistake in not providing for premium payments on property which might be destroyed up to the time when actual contracts can be written."

Mr. Steagall replied:

"Of course, that is a matter that is past. What the conference report does is to embody the House provision in that respect, so that the matter is closed." (id., pp. 2660, 2661)

The entire legislative history demonstrates that the intent of the property in transit amendment to the bill was to extend protection to any and all property passing between the United States and its possessions and territories; and nowhere in the course of the subsequent legislative proceedings is there indicated any desire to restrict or revoke that protection. No comment of any witness or of any Congressman or Senator indicated a desire to deprive the owners of vessels of the protection given by the Act to all other property owners.

On the contrary, unequivocal statements were made not only by Senators and Congressmen from the floor, but by those in charge of the presentation of the bill to the House of Representatives, clearly indicating the understanding and intent that vessels were consciously and intentionally included within the terms of the bill.

IV. The District Court Ignored Settled Principles of Interpretation and Reached an Irrational and Discriminatory Result

A. THE DISTRICT COURT'S INTERPRETATION IS INCONSISTENT WITH ADMITTED FACTS.

The trial judge's opinion suggests that the "property in transit" clause covers *cargoes not insurable by the Maritime Commission and nothing else*.

The concluding sentences of his opinion state:

"The defendant corporation was never proposed to have anything to do with the sea. This was in the field of the Maritime Commission. The defendant only 'put to sea' because of the needs of Hawaii and Alaska—to enable these territories to receive the goods needed to carry on during the stress of the great emergency and only to the extent of protecting cargoes en route either way not insurable by the Maritime Commission. Ships were otherwise covered." (77)

The same narrow interpretation is indicated in other passages of the opinion.¹⁰

That interpretation cannot stand, for admittedly cargoes were protected throughout the free period, although they were insurable by the Maritime Commission. It is refuted by the admitted fact that things other than cargoes were protected, i.e., baggage and personal effects. Congress itself, after adopting a proviso to exclude all property which the Commission was authorized

10. See the discussion commencing at the bottom of pages 69-70 and 75-76.

to insure, expressly amended the bill to remove that limitation upon the protection afforded in the free period. To adopt the court's construction would revive the very proviso which Congress deleted. The court's opinion ignores the overwhelming evidence that the "in transit" clause was adopted with the clear understanding that it would result in a duplication between defendant and the Maritime Commission. And, finally, it would nullify the "in transit" clause because *all* cargoes between the United States and Hawaii or Alaska were insurable by the Maritime Commission.

We believe that the basic error of the Court lies in the fact that it abandoned the fundamental rule of interpretation which chooses the plain meaning of words and sought to fix the meaning of the statute by inferences drawn from legislative proceedings.

B. THE DISTRICT COURT IGNORED SETTLED PRINCIPLES OF INTERPRETATION.

The opinion barely mentions the statute. There is no comment about whether the plain words of the Act cover vessels or not. There is no comment about whether the literal meaning of the Act is in accord, or in conflict, with the general purposes of the statute. Indeed, the express words were disregarded and the Court interpreted the law solely on the basis of inferences which it drew from the legislative proceedings. We think it is settled law that the interpretation of statutes is not to be approached in such a manner.

The trial judge laid great stress in his opinion upon discussion for the need of protection for water-borne cargoes in connection with the adoption of "in transit" clause. While we do not agree that that discussion pointed to the protection of cargoes only, even if we assume that the protection of water-borne cargoes constituted the chief purpose of this provision, the comprehensive language used in the Act cannot be restricted to the protection of cargoes alone. If a particular application of

a statute is fairly within the meaning of its language, the court will not refuse to apply it to a case, merely because it is one not specifically referred to in the deliberations of Congress.¹¹

In *Canadian Aviator Ltd. v. United States*, 324 U.S. 215, 89 L.Ed. 901, 65 S.Ct. 639, a statute waived sovereign immunity in suits "for damages caused by a public vessel." In holding that the statute, despite the rule of strict construction applicable to such a waiver, was not confined to collision, the court said:

"The fact that the Committee reports on the bill state that the '*chief purpose*' of the Act is to authorize recovery in collision cases, that the departmental letters attached to the report consider principally the 'collision' situation, does not require that the statute should be so limited." (p. 225)

And in *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 89 L.Ed. 1534, 65 S.Ct. 1063, it was held that a bona fide collective bargaining agreement did not exclude application of the Fair Labor Standards Act:

"Statements in the legislative history to the effect that the Act was *aimed primarily* at overworked and underpaid workers and that the Act did not attempt to interfere with bona fide collective bargaining agreements are indecisive of the issue in the present case. Such general remarks, when read fairly and in light of their true context, were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire to allow the coal industry to use private customs and agreements as an excuse for failure to compute the work-week as contemplated by § 7(a)." (pp. 168, 169)

Plainly, Congress did not confine the protection to cargoes, the principal subject of discussion, for it will be conceded that the law equally applies to baggage and personal effects which were never discussed.

11. See discussion at pages 18 to 21, *supra*.

C. THE DISTRICT COURT WAS MISLED BY DEMONSTRABLE ERRORS.

The opinion of the trial judge consists principally of a review of the proceedings in Congress preceding the adoption of Section 5g of the Reconstruction Finance Corporation Act. We believe that he misconstrued the meaning and effect of those proceedings and the statements made in the course thereof, principally because of an error of both law and fact, on which the opinion is principally predicated.

The trial judge indulged in the erroneous assumption that shippers of cargo between the mainland of the United States and the territories of Hawaii and Alaska could not determine in advance whether their cargoes would be carried on American or foreign vessels.

On that subject the court said (page 69):

"The Maritime Commission by such Act was empowered to issue such insurance only on American vessels and their cargoes. Since shippers of cargo could not determine in advance the type of vessel in which the same would be transported, the practical result was that while insurance on American hulls could be and was made available by the Maritime Commission under the Act cargoes, except in a very limited way were unprotected."

This assumption of the court was clearly in error. For many years the navigation laws of the United States have prohibited the carriage of cargo between ports of the United States and its territories in foreign bottoms and has confined these trades to American vessels (46 U.S.C. Sections 883, 877). At the time that the law was under consideration, all goods en route between the United States and Hawaii and Alaska were necessarily to be carried in American vessels. Indeed, that law applied to trade with all of the territories and possessions, except the Philippines, and there was no trade at that time with the Philippines. Obviously, then, no American shipper in the domestic trades was in any doubt concerning the fact that his

cargo would be carried on American vessels and that the United States Maritime Commission was empowered by law to insure it.

This misunderstanding by the court accounts for its misinterpretation of the testimony given before the Senate and House Committees and the statements on the floors of both Houses. For the court evidently assumed that the situation which faced Congress with reference to cargoes when the Bill was under consideration was essentially different from the situation confronting it concerning ships, when in fact no such difference existed.

D. AN INTERPRETATION OF THE ACT TO EXCLUDE VESSELS IS IRRATIONAL AND DISCRIMINATORY.

To construe the Act as one excluding ships from the protection extended to property in transit during the free protection period would impart to the law the effect of senseless distinction and unreasonable and irrational discrimination.

Did the trial court adopt the view that the phrase "such property in transit" embraces cargo exclusively and excludes all vehicles of transportation? What imaginable distinction exists between the carrier and the cargo as objections of protection? What reason could there be to protect property carried by plane, truck, or rail, even by ship, while protection is refused to the property devoted to carrying the cargo?

And if instruments of transportation are not "property" when that word is used in conjunction with "transit," then Congress gave protection to carriers as property in the territorial limits of the United States and captiously excluded the same carriers from the protection granted other property while in transit. Such irrational results will not readily be imputed to the Congress.

Or, did the trial court adopt a theory that "such property in transit" included all property, cargo, personal effects and the vehicles of their carriage, including planes, trucks, and rail facilities and excluded *ships* only?

It is submitted that the language used does not permit of that construction. But certain remarks of the trial court suggest it. Plainly, if Congress had that intent, it needed only to add the two words "except ships" and it refrained from so doing. But were that the meaning of the Act, what rational basis could exist for protecting the ships in port and refusing them protection at sea? The availability of insurance from the United States Maritime Commission while at sea would not be the justification; for the Commission's power to insure was the same in port as at sea. What reason can be assigned for excluding ships from the protection afforded its own cargo when the authority of the Commission to insure either cargo or ships was the same? In fact, at the time the *Lahaina* was lost, cargoes and ships were in the identical situation because the Maritime Commission had not exercised its authority to make it available to either.

The judgment of the trial court is predicated upon the insertion in Section 5g of the Act of an exception which cannot be found in the law itself. Its decision necessarily rests upon an interpretation creating distinctions which are unsubstantial and unreal and which produce arbitrary results and create inequalities. Assuming that the law were so obscure in meaning so as to justify resort to rules of interpretation, no interpretation will be accepted which leads to such results (50 Am. Jur. 380).

It is respectfully submitted that the Congress never intended the exclusions implied in the decision of the trial court; it is submitted that the purpose of the Act was to establish free protection during the free period for all losses sustained by property owners as the result of enemy attack without distinction or discrimination; that that protection was at the expense of the taxpayers of the United States and for the benefit of all property owners as a war measure to allay the apprehension arising out of the fear of enemy attack, and thus promote and increase production and maintain public confidence. The plain

meaning of the law can be followed and the policy of Congress fulfilled only by applying the protection of the Act to all property, real and personal, including ships whether in movement or at sea.

Numerous affirmative defenses and contentions were advanced by defendant in the trial court. All of them were ignored by the trial judge; and we cannot anticipate which, if any of them, defendant may raise to sustain the judgment. Plaintiff will answer in its reply brief any of such defenses or contentions which defendant may assert in this court.

Dated: August 16, 1948.

Respectfully submitted,

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(Appendix A Follows)

APPENDIX A

United States Code Annotated

Title 15—Commerce and Trade

§ 606b—2. *Funds for War Damage Corporation; insurance against property injury by enemy attack*

(a) The Reconstruction Finance Corporation is hereby directed to continue to supply funds to the War Damage Corporation, a corporation created pursuant to section 606b and 609j of this title; and the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this subsection. Such funds shall be supplied only upon the request of the Secretary of Commerce, with the approval of the President, and the aggregate amount of the funds so supplied shall not exceed \$1,000,000,000. The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable. Such protection shall be made available through the War Damage Corporation on and after a date to be determined and published by the Secretary of Commerce which shall not be later than July 1, 1942, upon the payment of such premium or other charge, and subject to such terms and conditions, as the War Damage Corporation, with the approval of the Secretary of Commerce, may establish, but, in view of the national interest involved, the War Damage Corporation shall from time to time establish uniform rates for each type of property with re-

spect to which such protection is made available, and, in order to establish a basis for such rates; such Corporation shall estimate the average risk of loss on all property of such type in the United States. Such protection shall be applicable only (1) to such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States, (2) to such property in transit between any points located in any of the foregoing, and (3) to all bridges between the United States and Canada and between the United States and Mexico: *Provided*, That such protection shall not be applicable after the date determined by the Secretary of Commerce under this subsection to property in transit upon which the United States Maritime Commission is authorized to provide marine war-risk insurance. The War Damage Corporation, with the approval of the Secretary of Commerce, may suspend, restrict, or otherwise limit such protection in any area to the extent that it may determine to be necessary or advisable in consideration of the loss of control over such area by the United States making it impossible or impracticable to provide such protection in such area.

(b) Subject to the authorizations and limitations prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such loss or damage. Jan. 22, 1932, c. 8, § 5g, as added Mar. 27, 1942, c. 198, § 2, 56 Stat. 175.

No. 11,925

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MATSON NAVIGATION COMPANY (a corporation),
Appellant,

vs.

WAR DAMAGE CORPORATION (a corporation),
Appellee.

BRIEF FOR APPELLEE.

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IN THE

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MATSON NAVIGATION COMPANY (a corporation),
Appellant,

vs.

WAR DAMAGE CORPORATION (a corporation),
Appellee.

BRIEF FOR APPELLEE.

STATEMENT.

Matson Navigation Company appeals from the holding of the United States District Court denying recovery from War Damage Corporation, a government agency, for its loss of the Steamship LAHAINA, sunk by enemy action while on a voyage from the Hawaiian Islands to the United States, December 11, 1941.

The statute upon which appellant bases its claim is Section 5-g of the Reconstruction Finance Corporation Act as added March 27, 1942, 56 *Statutes at Large* 175, 46 U. S. C. A. 606 b-2.¹ A full understanding of this statute requires consideration of its historical background, in-

¹The District Court in its opinion referred to the U. S. C. A. citation. The complete text of this statute is printed in Appendix A for convenient reference.

cluding the comprehensive governmental program of war insurance. In World War I, the United States had adopted a program for insuring the lives of the men engaged in the war and, in addition, made provision for supplementing commercial underwriting of war risk insurance on cargoes and ships. Because of our geographic location, attack against this country was not anticipated in World War I, and governmental insurance did not extend to coverage for damage to property in the United States.

The need for these same types of insurance with respect to World War II was realized at an early date. In 1936, insuring powers were granted to the Maritime Commission for certain marine coverage.² These powers were extended in 1940,³ and a bill to further extend the Maritime Commission's insurance powers was under consideration by Congress simultaneously with consideration of the War Damage Corporation Bill.⁴

Also as part of the governmental insurance program, prior to our entering into World War II Congress again took appropriate action to provide government life insurance at a premium for members of the armed forces by enacting the National Service Life Insurance Act of 1940 (38 U. S. C. A. 801). But World War II brought with it a danger to the homeland not foreseeable in World War I. The danger, of which the United States became vividly aware by the attack on Pearl Harbor, was from bombings by air attack in the United States and its terri-

²Act of June 29, 1936, Chapter 858, Title 2, 46 U. S. C. A. 1128a.

³Amended June 29, 1940.

⁴H. R. 6554, introduced February 6, 1942, enacted April 11, 1942.

tories. Insurance companies, having no prior experience with war risk protection from this danger, and having no backlog of experience ratings on which to base their premiums and no adequate reserves for this contingency, were unable to meet this new situation, as appears from the committee hearings on the War Damage Act.

It was to provide protection for this danger and to allay the fears arising from the threat of this danger, that the War Damage Corporation Statute was enacted. Appellee, War Damage Corporation, was the governmental agency set up to administer the Statute. As enacted, the law required the War Damage Corporation, with such general exceptions as it deemed advisable, to provide by July 1, 1942, insurance, on a premium basis, for damage resulting from enemy attack to property in the United States and in the territories and possessions of the United States and, as shall hereafter appear, as a concession to the territories of Hawaii and Alaska, to goods in transit between the designated localities. In the interim, before the premium-paying insurance program could be set up, the War Damage Corporation was permitted to provide certain free protection for damage which had already occurred or which might occur before July 1, 1942.

The Maritime Commission was authorized to provide, for a premium, war risk insurance for ships and cargoes (although until the 1942 amendment this was limited to American ships and cargo carried in American bottoms), if such insurance could not be obtained from private sources at a reasonable rate. It should be assumed that the commercial market provided marine war risk hull insurance at a reasonable rate at least until December,

1941, when the Maritime Commission first exercised its powers and wrote such war risk insurance.⁵ Matson obtained war-risk hull insurance from the Maritime Commission at least as early as the first committee hearing on the War Damage Corporation Act.⁶ During the period prior to the premium program, a limited marine coverage which might duplicate the coverage offered by the Maritime Commission was authorized to be extended by War Damage Corporation, but after July 1, 1942, no coverage was permitted which the Maritime Commission was authorized to provide.

It is appellee's position that the loss of appellant's LAHAINA was beyond the meaning, scope and purview of the Statute. As the District Court stated (Tr. 66 and 67), "The meaning of the statutory language must be resolved against the background of the history of and the circumstances impelling the legislation as well as from what may be gleaned from the Congressional proceed-

⁵Sen. Com. Hearings, 98. The following abbreviations for references will be used throughout the Brief:

(a) Transcript of Record—"Tr." followed by a page number;

(b) Senate Committee Hearings—"Sen. Com. Hearings" followed by page number;

(c) Senate Committee Report—"Sen. Com. Rep.", followed by page number;

(d) House Committee Hearings—"House Com. Hearings", followed by page number;

(e) House Committee Report—"House Com. Rep.", followed by page number;

(f) Report of Committee of Conference—"Conf. Rep.", followed by page number;

(g) Volume 88 Congressional Record Permanent Edition—88 Cong. Rec. Perm. Ed., followed by page number;

(h) Appellant's Opening Brief—Op. Br. followed by page number.

⁶Docket No. 610, 2 U.S.M.C. 623.

ings.” District Judge Goodman, as is evidenced from his opinion (Tr. 64-77) made a thorough study and analysis of the Statute, its background and its legislative history and properly concluded that appellant’s loss was not covered by the Statute and that “plaintiff entirely misconceives the function of the defendant as intended by Congress.” (Tr. 76).

If appellant’s construction of the Statute is correct, vessels on coastwise, intercoastal, and inter-island voyages and on voyages between the United States and its possessions would be given free coverage from the first day of the war until July 1, 1942. It is common knowledge that there was a large number of vessels sunk by enemy action for which, if appellant’s construction had any merit, claims could have been presented under the Statute. Only two claims, in addition to appellant’s, for loss of or damage to vessels were ever presented to War Damage Corporation.⁷

It is thus apparent that practically the entire marine and the insurance world agree with the interpretation placed on the Statute by the War Damage Corporation and by District Judge Goodman rather than with the construction for which Matson contends.

The fact is that Matson did not place reliance on the statute to cover its vessels as it was more than three years following its loss that appellant even presented a claim to the War Damage Corporation.

⁷One was for a fishing vessel on the Atlantic Coast and the other for the SS Montebello lost on the Pacific Coast. Both were rejected (as was appellant’s claim) by War Damage Corporation. No recovery was obtained by either claimant (Tr. 345-348).

Although several separate defenses were presented and argued before the District Court, District Judge Goodman based his decision that appellant's loss was not covered by the Statute squarely upon the meaning of the language itself as determined from the language, the background and legislative history of the Statute and, therefore, determined it to be unnecessary to consider the other defenses.⁸ Appellant's Opening Brief is limited to argument on the issue as to whether the loss of the LAHAINA is included in the "in transit" clause of the Statute. We propose to answer squarely the arguments presented on this point and the legislative materials referred to, as did the District Court in its opinion. In addition thereto, we shall show that the War Damage Corporation, in conformity with Congress' frequently declared determination not to cover ships by the Statute, and, pursuant to specific authority conferred upon it by the Statute, excepted, among other things, the class of property which includes the LAHAINA and also shall show that the free protection section of the statute is discretionary and not mandatory and, therefore, does not confer upon appellant, or any other claimant, the right to compel a judgment for any loss occurring during the free period.

I. THE STATUTE DOES NOT COVER THE LOSS OF THE LAHAINA.

- A. General Purpose of the statute was to provide protection for losses from bombings on land for which Commercial Insurance was unavailable.**

The basic reason for the creation of War Damage Corporation is succinctly stated in the Report on the Bill by the Senate Committee on Banking and Currency:

⁸Tr. 66 and 67, Footnotes 1 and 2.

“* * * Due to the widespread fear of bombing prevalent throughout the country during the first weeks of the war, principally along the west coast and in the metropolitan centers of the Atlantic seaboard, it was felt by the Administration, in the interest of allaying a state of mind affecting production and undermining morale, that assurances should be given that property owners would be given reasonable protection from losses due to enemy attack, since that protection *could not be obtained from private insurance companies.*” (Sen. Com. Rep. 2).⁹

That it was the fear of damage resulting from this relatively new type of warfare, bombing of our cities, particularly on the coastal areas, that was the impetus compelling the action, is stated frequently by the members of Congress during pendency of the legislation. For example, Senator Maloney, Floor Manager of the Bill for the Senate Committee, stated in committee,

“I think that if there are bombings and there are great losses on *either of the coasts*, all the people of the country should share the burden, * * *” (Sen. Com. Hearings, 16).

and on the floor of the Senate in explaining the purposes of the bill and that “We should anticipate bombings in our country,” he said,

“This is a new experience in the United States.” (88 Cong. Rec. Perm. Ed., 959).

It was pointed out in the committee hearings and on the floor of Congress that the insurance companies were not prepared to cope with the problem (Sen. Com. Hearings, 7, 8; House Com. Hearings, 18; 88 Cong. Rec. Perm. Ed., 1849).

⁹Emphasis throughout this brief is ours.

Marine Insurance companies, on the other hand, traditionally dealt with war risks on a world-wide plane, and wrote such insurance on hulls before, during and after the enactment of this statute (Tr. 279).

Accordingly, the fundamental basis for the War Damage Corporation's program was to provide some protection for property located in the United States and its territories where protection was not otherwise available.

B. The Statute was not intended to and did not cover every species of property.

Review of the background of Section 5-g not only demonstrates that it was for the protection of property located in the United States and its territories, but also that it was not the intention to give protection to every species of property within the geographical limits prescribed.

The basis of appellant's argument is that Congress intended to provide free protection in sub-section (b), within specified geographical limits, for every conceivable species of property, hence necessarily for vessels such as the LAHAINA (Op. Br. 10-11; 32-33).

Excerpts from the legislative history are quoted in support. For example, on page 32 of Appellant's Opening Brief, appears the quotation of the statement by Mr. Smith:

“* * * It seems to me we should have that law simply covering losses *in toto*.”

and by Mr. Sacks,

“I incline to the theory that the Government owes protection to its citizens against enemy action regardless of the *amount*.”

These references, examined in their proper context, relate to the pecuniary amount of protection to be given, not to the types of property.

The general pattern of the legislative history clearly shows that all types of property were not to be covered.

The press releases of December 13 and 22, 1941, which were the forerunners of the Statute, contained specific exceptions for

“Accounts, bills, currency, debts, evidences of debt, money, notes, securities, paintings and other objects of art * * *”

These releases also made room for further express exceptions by stating “other terms and conditions for such protection will be announced as established.” This plan that War Damage Corporation would determine the types of property continued throughout the development of the statute and its administration. The Statute specifically authorizes the Corporation to make general exceptions which include exceptions as to types or classes of property.¹⁰ Throughout the administration of both the “free” and “premium” sections of the Act, War Damage Corporation excluded many types of property (Tr. 322). Mr. Claude Hamilton, who appeared before the committees of both houses, stated in support of an amendment to the house bill striking out a limitation to tangibles:¹¹

“It seems appropriate, then, to permit the Administrator to establish the various classifications of

¹⁰More fully discussed under Section II of this brief.

¹¹See discussion (Section II-B of this brief) showing that the striking of the original limitation to tangibles was for the purpose of leaving the determination with respect to such limitations up to the administrative determination of War Damage Corporation.

property to be covered as necessity and experience may require or permit. * * *'' (88 Cong. Rec. Perm. Ed. 1860).

Insured property was a type of property which was not intended to be within the protection of the Statute. Mr. Jones stated,

“* * * we do not propose to give anybody insurance who can buy insurance anywhere else.” (Sen. Com. Hearings, 98. See similar statement House Com. Hearings, 18).

Doubt was raised as to whether property owned by foreigners would be covered (Sen. Com. Hearings, 16) and a representative of the American Municipal Association appeared specially and requested an amendment to cover public as well as private property, being in doubt as to whether, without such an amendment, the statute would include public property (Sen. Com. Hearings, 35 to 52).

These references to the legislative history clearly refute the basic premise of appellant that every species of property was covered.

C. The press releases did not cover ships.

The loss of the LAHAINA is not covered by the press releases not only because ships were not within the purview of the release but because the LAHAINA was lost prior to the effective date of coverage of the releases and also was not situated in the United States or one of the territories enumerated therein. The press releases are, however, of significance in showing the general scope of protection contemplated. It was announced through the re-

lease of December 13 that the Corporation was created in order

“* * * to provide reasonable protection against losses resulting from enemy attacks which may be sustained by owners of property in continental United States through damage to, or destruction of *buildings, structures and personal property, including goods, growing crops and orchards.*”

The release of December 22 extended the protection to certain territories.

We do not take issue with appellant's contention (Op. Br. 25) that a strict application of *ejusdem generis* to the italicized phrase in the above quotation does not require a construction that “personal property” following “buildings and structures” must be personal property of a type associated with buildings and structures, but we think it perfectly plain that this description of the coverage bears no relationship to vessels and implies property located on land.

D. The legislative history of the Act demonstrates that vessels were not covered.

A full view of the legislative history of the Statute leads inevitably to the conclusion reached by the District Court that ships were not covered.

1. Proceedings in the Senate Committee and on the Senate floor prior to conference revision.

On January 14, 1942, one month after the first press release, the War Damage bill was introduced into the Senate (88 Cong. Rec. Perm. Ed., 318) and referred to

the Committee on Banking and Currency.¹² Mr. Jesse Jones, the Federal Loan Administrator, who had previously formed the War Insurance Corporation (original name of War Damage Corporation) and, by the issuance of the press releases, had launched a program of war risk protection, and who was the proponent of the bill, appeared before the committee to explain its purposes and answer the committee's questions.

The bill as introduced, following the lead of the press releases, was limited to property situated in the United States and in designated territories and did not include an "in transit" clause.

The first mention of ships appears on page 10 of the Transcript of the Senate Committee Hearings when Senator Brown stated he was interested in determining where the line would be drawn between private and government insurance and specifically inquired whether a ship in collision, as a result of governmentally-imposed blackout conditions, would be covered. Mr. Jesse Jones replied,

"That is maritime insurance. We do not provide maritime insurance."

A few minutes later Senator Brown stated that he thought the War Damage Corporation had "the power to take care of maritime insurance" and Mr. Jones replied that the Maritime Commission already does that (Sen. Com. Hearings, 11).

There was then, in the entire background of the Statute from the issuance of the press releases through the first

¹²The identical bill was introduced into the House at the same time.

day of hearings in the Senate Committee no inkling of any intention to provide any marine coverage and no indication that ships or cargoes were under consideration.

The first suggestion that the bill should include a limited marine protection for goods came at the beginning of the second day of the hearings before the Senate Committee when Delegate King of Hawaii and Delegate Dimond of Alaska appeared to present a situation peculiar to their respective territories. Their position was that both Alaska and Hawaii are dependent for their existence on a life line of goods imported and exported. These goods were as important to them while "in transit" as goods "situated in the United States" were to the residents of continental United States. They urged that these goods and products should be given the same protection while in the course of transportation as was given to the goods of the people in the States situated in the States. They were not interested in ships but only in the *goods* which ships transported.

Delegate King led off with the statement:

"Mr. Chairman, this subject of war insurance is, of course, very important to the Territory and to the people there. Furthermore, the phase of it that would carry the coverage of *goods* in transit is extremely important. We are dependent entirely upon water-borne transportation. The bill as it now reads would protect tangible property, real and personal, while situated in the United States.

"*Goods* can be transferred from Maine to Florida and not leave the United States, but unfortunately the minute *they* are transferred from Hawaii to any other part of the country *they* pass out of the exact

technical status of being within the United States. I am concerned as to that feature.” (Sen. Com. Hearings, 25).

Mr. King had two additional points: (1) that the Statute should go back to cover losses from December 6, 1941, and (2) that money and securities be covered:

“So, I should like to ask the committee to consider making the bill effective as of the calendar date December 7 to include coverage for all forms of property in transit from one part of the United States to another, and to include intangible property—that is, currency and securities—under the types of property covered. Those are the three points I should like to suggest, Mr. Chairman.” (Sen. Com. Hearings, 26).

Appellants (Op. Br. 35) quoted a portion of the foregoing remark, emphasizing the phrase, “all forms of property in transit” as lending some possible support to the position that perhaps Delegate King had ships in mind as well as goods. It is apparent, however, that Mr. King in referring to “all forms of property” meant both tangible goods and intangibles such as the money and securities he had referred to. The bill at that time was limited to “tangible property.” It was also limited to property “situated.” He desired to broaden its coverage to include both tangibles and intangibles, i.e., “all forms” in transit and to extend the coverage for property “situated” to intangibles. He so stated.

This misconceived interpretation was the only aid appellant could find in Mr. King’s entire testimony. Nowhere are ships mentioned, but only goods, products, and

things carried. A few additional excerpts from his statement, to the Senate Committee, both oral and written, will serve to illustrate:

“Hawaii sends its *products* to other parts of the United States by water-borne transportation, and receives its merchandise through the same means, a commerce which normally amounts to over \$200,000,000 in value annually. Commercial rates for insuring this *transfer of goods and commodities* are prohibitive in war-time, and would destroy the economy of the Territory.” (Sen. Com. Hearings, 27).

* * * * *

The problem of insurance while *goods* are in transit is absolutely vital to the Territory. We ship out of Honolulu everything we *produce* and that we sell in the mainland markets, and we have to have everything shipped out to us. Everything we buy comes from all over the country. (Sen. Com. Hearings, 27).

Delegate Dimond, who testified immediately after Delegate King, made a similar plea except that he was not concerned with the feature of making the coverage retroactive to December 7, 1941. He emphasized that the situation in Alaska was even more acute than in Hawaii by referring to the fact that, as a result principally of the increased hazard, the steamship rates had risen 35% to Hawaii, while those to Alaska had risen 45%, and stated:

“So, if that is any indication of the risk, why, the risk is even greater in *transporting supplies* between the United States and Alaska than exists with respect to the *transportation of supplies* between Hawaii and the United States.” (Sen. Com. Hearings, 32).

It is evident from this remark that Mr. Dimond, in referring to steamship rates, was not concerned with ships, as appellant seems to infer (Appellant's Br. 36).

Senator Maloney, who took an active part in the formulation of the Statute, acting as Floor Manager, and on the Conference Committee, was not in doubt as to the fact that it was "*goods*" with which the Delegate was concerned. He asked,

"Will you tell me what your concern is about the *transportation of goods* between the United States and Alaska?" (Sen. Com. Hearings, 33).

Mr. Dimond responded,

"Yes, Sir. I suggest in fairness, since *goods in course of transportation* between the various States are covered by what Mr. Jones has well called this policy of insurance, that *goods in transportation* between the integral parts of the United States, such as Hawaii and Alaska, even though on the high seas, ought to be given the benefit of the same kind of insurance. I think that is only fair. * * *" (Sen. Com. Hearings, 33).

Senator Clark of Idaho recognized the problem, saying:

"You get into a very peculiar situation there unless you do afford this extended protection to *goods in transit* either by airplane or by steamship." (Id. 33).

Senator Maloney wanted to be sure he understood how far Mr. Dimond wished to go, and asked:

"I am anxious to get clear in my mind how far you would have us go. Would you want protection for *petroleum products* going up there by tanker and for

other *things* that are going to Alaska?" (Sen. Com. Hearings, 33).

And Mr. Dimond responded:

"Whatever *products* are protected under this insurance policy in the States and in the Territories should be protected just as much on the high seas between the States and the Territories whether it is *petroleum products* or *salmon*, or *sugar* and *pine-apples*, which are *produced* in Mr. King's Territory, or what not." (Id. 33).

Appellant seeks to infer from the use of "what not" in this last remark that Mr. Dimond was including something other than goods or articles conveyed (Op. Br. 36). As the word "*products*" is used and particular products are listed, is it probable that Mr. Dimond was doing any more in using the phrase "or what not" than including any other *products* not specifically mentioned. The point made was that Senator Maloney had singled out "petroleum products." Mr. Dimond in effect replied, "all *products*."

We cannot perceive how anyone reading the full text of the testimony of these delegates before the committee could come to any conclusion other than that to which the District Court came, namely, that they were urging an amendment to cover "*goods* in transit." (Tr. 68).

Senator Clark of Idaho championed the cause of Delegates Dimond and King and proposed an amendment to cover the situation presented by the delegates. The amendment was first suggested, after the following comment by Mr. Jones:

“With reference to shipping about which Mr. Dimond testified, the Maritime Commission can insure *cargoes*. If it is desirable for us to extend additional help there we can do it under the regulations. I concur with his views.” (Sen. Com. Hearings, 73).

Senator Clark thereupon remarked that under the bill as it was then written, because of the limitation to “property situated in the United States,” Mr. Dimond’s problem could not be covered. He then stated:

“* * * I had a proposed amendment that I was going to offer in due time, saying ‘or in transit between.’

“That would merely remove the limitation, so that you could go into this question of shipping.” (Id. 73).

Appellants (Op. Br., 38) quote this last sentence by Senator Clark and interpret it as indicating that the “broadest possible latitude” was intended with respect to the introduction of the “in transit” clause, but we submit that the word “shipping,” as used by Senator Clark, in light of the preceding discussion and the testimony of Delegates King and Dimond was not intended by the Senator as in any way covering vessels.

The Clark “in transit” amendment was formally adopted in the Senate Committee Hearings near the close of the third day (Sen. Com. Hearings, 100). Its formal adoption was immediately preceded by a general discussion with respect to the problems presented by delegates King and Dimond and the extent of the insurance powers of the Maritime Commission. This discussion was initiated by Senator Brown, who asked, “You are satisfied that you

should not touch Maritime insurance at all in this bill?" To this Mr. Jones replied:

"No; I am not. I think we should have the authority to cover these *things* in transit between Alaska and Hawaii and the mainland in cooperation with the Maritime Commission." (Sen. Com. Hearings, 96).

The discussion continues for several pages in the record but the following excerpts suffice to show that duplication of coverage by the Maritime Commission was, so far as possible, to be avoided and that the amendment was intended to cover objects conveyed and not the conveyance.

The Chairman (Senator Wagner). I think that when Senator Clark proposed this amendment, he assumed that there was no insuring of *cargoes* by the Commission." (Sen. Com. Hearings, 98).

Mr. Jones advised the Committee of his discussions at the White House after the first day of hearings, saying,

"I discussed this matter in detail with the President. I raised every question that has been raised here. He thought that all these suggestions should be considered and that we should cover *cargoes in transit* from the islands to the mainland if insurance is not otherwise available. He thought if we charged a premium, insurance should be available to the cities. Generally I tried to remember every suggestion that has been made here, and he thought every one had merit." (Id. 99).

The Report of the Senate Committee on the Bill does not mention the "in transit" clause. The Committee version of the Senate bill was presented on the Senate floor February 3, 1942, five days after the last day of hearing

before the Committee. Senator Maloney acted as Floor Manager for the Committee. In his explanation of the coverage of the bill he explained the "in transit" clause in the following language:

"The policy would cover all tangible property of Americans in the United States which might be damaged as a result of bombing or the direct hazards and effects of war caused by enemy attacks. The committee went a step beyond that. It made provision in the language of the bill for the War Damage Corporation to afford *protection to the CARGOES of vessels traveling between the United States and our Territories and other places. That not only means that the cargo of the vessel itself* could be insured—and I may say parenthetically that the Maritime Commission has certain moneys and authority under existing law to provide like coverage—but it also provides for covering of the personal effects of people traveling on such vessels." (88 Cong. Rec. Perm. Ed. 958).

Although the debate in the Senate prior to adoption of the committee bill was exhaustive, covering some 14 pages of the Congressional Record, this is the only reference to the "in transit" clause. There is no mention of protection for ships, hulls or vessels.

Appellants endeavor (Op. Br. 42) to lessen the force of Senator Maloney's reference to "cargoes" by stating that Senator Maloney was not endeavoring to include all types of property covered in the "in transit" clause. Senator Maloney had taken an active part in the Committee Hearings and in the discussion engendered by the appearance of the two delegates. His reference to "cargoes" in explaining the bill to the Senate was the natural

result of the discussion in committee in which cargoes and things carried were synonymous with "in transit."

2. Proceedings subsequent to the enactment by the Senate of the Senate Bill.

The House Committee on Banking and Currency began its hearings February 2, immediately discarding the Bill as originally introduced in the House, and proceeding with a consideration of the Bill reported out of the Senate Committee. During the course of four days of hearing, the protection offered by the "in transit" clause is frequently mentioned. It is first mentioned by Mr. Williams, a member of the Committee and one of the managers on the part of the House in the conference, in the following discussion:

"Mr. Williams. I notice a provision in the Senate bill which *provides for goods in transit*, in transportation; what does that mean?

Mr. Jones. That was put in there at the suggestion of the Representatives of Alaska and the Hawaiian Islands. Their only contact with the mainland is by water; so we thought insurance should be available to them for this purpose.

* * * * *

Mr. Williams. Would that insurance cover any transportation of *goods, or goods in transit*, that belonged to foreign countries—foreign nationals?

Mr. Jones. It could, if they were not enemy countries.

Mr. Williams. The same principle would apply to that insurance that would apply to property insurance?

Mr. Jones. Yes; I am sure that is right.

Mr. Williams. It would cover any *goods* or any property that was not owned by an enemy alien.

Mr. Jones. That is correct. That would be our thought about it.

Mr. Williams. Well, would this cover insurance of *goods* in foreign vessels?

Mr. Jones. Yes; it could, because a good many of those vessels are foreign vessels; but they are friendly foreign vessels.

Mr. Williams. It would not cover the vessel itself, would it—or would it?

Mr. Jones. I do not think so; no. *We would insure the merchandise in the vessel.*” (House Com. Hearings, 21, 22).

It is significant that Mr. Williams assumed at the outset, without prior explanation, that “property in transit” referred to “*goods* in transit.” He makes no reference to anything except “goods” until, as an after thought, he states that it would not cover the vessel itself and seeks and obtains assurance on the point from Mr. Jones. While this question and answer immediately follow remarks about goods in *foreign* vessels, considering the discussion as a whole it is apparent that it was the first time the thought of protection of vessels, whether foreign or American, had occurred to Mr. Williams. The unavoidable inference is the opposite of that drawn by appellant (Op. Br. 43, 44).

Delegates King and Dimond also appeared before the House Committee. Mr. King presented his case orally, Mr. Dimond by written statement. Mr. King launched into his discussion with the comment,

* * * * *

“At the instance of Delegate Dimond and myself, the Senate adopted an amendment that extended that protection or coverage to property situated in the

United States, as defined by the bill, and 'to such property in transit between any points located in any of the foregoing.' The importance of that to us, Mr. Chairman, is that all of the commerce with Alaska and Hawaii and other parts of the United States is waterborne, or carried by air.

"Personal property would be completely covered in transit between Detroit and New Orleans or between Maine and Florida under the original terms of the bill; but all of the *goods* that we ship out of Hawaii—sugar and pineapples, particularly, but also other *products*—and those that go out of Alaska, such as salmon and furs, have to go by water. Also, all of the *goods* that we purchase from other parts of the United States have to go to Hawaii in waterborne commerce. It is the same with Alaska." (House Com. Hearings, 52).

These remarks, unmistakably limited to *goods*, *products* and *things carried*, were followed by an extended discourse on "the increase in the war risk rate on *cargoes*." (Id. 53). He pointed out that these rates to Alaska jumped 100 times over peacetime rates and were, at the time of his testimony, 30 times that rate. He stated that a higher rate than 1/10 of 1 per cent "would burden shippers from Hawaii, who must sell their *products* on the mainland, doing so in competition with *goods* that have not paid that rate." (Id. 55).

Further proof that the House Committee was concerned with cargoes, goods and things carried and not with the vessel, when indeed they were concerned with marine coverage at all, is shown by the following additional extracts from the House Committee Hearings.

Mr. Lynch stated that as long as insurance companies could handle insurance on hulls:

“* * * plus the fact that we have the situation with respect to the Maritime Commission, that there is no further need for us to legislate on the point, *except as to the cargo that might be in transit*, which could not get where there were reasonable rates available from the private insurance companies or through the Maritime Commission.” (House Com. Hearings, 42, 43).

Mr. Steagall, the chairman, remarked that Mr. Lynch had thus “expressed accurately the views expressed both by Mr. Jones and Mr. Hamilton, as *I* understand their position.” (Id. 43).

Mr. Lynch offered an amendment excluding the operation of the “in transit” clause where the insurance could be obtained privately or through the Maritime Commission. There followed a considerable discussion concerning the “in transit” provision, whether it should be left in and whether it included “*goods* in transit” on railroads and trucks as well as on ships. While it seems apparent that the committee members were confused with respect to some aspects of the coverage intended, there is not the slightest indication that anyone considered the “in transit” clause embraced the vehicle carrying the goods:

“Mr. Williams. Mr. Jones, what is the necessity for passing another act at all with reference to *goods* in transit. Why cannot the Maritime Commission law, or whatever law it is in the form in which it was passed, be amended to meet the present emergency and leave out of consideration an entirely different

act to insure *goods in transit*? It seems to me that you are setting up two agencies to do exactly the same thing when one agency could take care of it
* * *”

Mr. Jones. The bill we submitted did not provide for that.

Mr. Williams. That provision was put on in the Senate?

Mr. Jones. That was written into the bill later. *It was changed, as I recall, at the request of the representatives of Alaska and Hawaii.*

* * *
Mr. Gifford. Transit by water or railway would also be covered in this field; it is not limited to *cargo* carried on the water.

Mr. Williams. I would cover *cargo* on both boats and railroads, *goods in transit* would be covered?

Mr. Gifford. *Goods* or *boats and railroads*.

* * *
Mr. Williams. Is it the intention that *goods in transit*, on railroads and ships, or trucks, would be covered by this provision?

Mr. Jones. They could all be brought in if you included that language.

* * *
The Chairman. What was the reason for the change in the Senate? It was not contemplated by the bill as introduced that we would *take care of goods in transit*. That amendment was put on by the Senate, was it not?

Mr. Jones. Yes.

Mr. Williams. Is it not a fact, however, that *goods being shipped in transit* has reference only to water transportation?

Mr. Jones. That was the purpose.

* * *

The Chairman. Is it your understanding that if we use that broad language, you would not necessarily be limited to vessels on the water, but that it would cover any *goods in transit* by any method? I intend to suggest that there may be cases which will require that interpretation.

Mr. Jones. We have transit by plane, and by rail or truck also." (House Com. Hearings, 43 to 45).

Mr. Patman, on the last day of the House Committee hearings, inquired of Mr. Hamilton:

"* * * this bill, if it passed, would it protect the owner against *loss of cotton*, we will say, that was on the high seas after Dec. 7 and the ship was sunk, say, like the CITY OF ATLANTA?" (House Com. Hearings, 80).

He was not concerned with the *ship* but the cargo. The answer given was that the bill as then existed though it had the "in transit" clause, only covered losses in the future. Accordingly a retroactive clause was inserted, and Patman again inquired:

"That would include *cotton in transport*?" (House Com. Hearings, 82).

and received an affirmative answer.

Later when the Committee was summing up the various provisions of the bill, Mr. Patman adds:

"And includes *goods in transit*?"¹³

to which Mr. Steagall replied:

"It does, subject to the amendment Admiral Land suggested." (Id. 93).

¹³At no stage in the proceedings was the Bill actually worded, "goods in transit", but always read, "property in transit".

Appellants' characterization of our reliance upon "isolated remarks at Committee hearings" (Op. Br. 21) is demonstrated to be manifestly erroneous in light of the foregoing extensive excerpts from the record of both Committee hearings.

The only reference to the "in transit" provision in the Report prepared for the House Committee is a verbatim recital of the statutory terms.

Appellant (Op. Br. 45, 46) quotes the instance on the floor of the House at the time the House Committee Bill was under consideration, in which Mr. White inquired whether the bill applied to cargoes and ships on the high seas, and Mr. Steagall hastily replied, "Yes, under certain conditions," after which Mr. Steagall, who was obviously not sure of his grounds, refers the question to Mr. Bland who was the author of the Maritime Commission Insurance amendments then under consideration. Mr. Bland states:

"Things like that are being taken care of under the War Insurance bill [Maritime Commission Authority] which was extended today. I have just put into the basket a report on the amendment to that bill which covered every phase of the marine liability and risk." (88 Cong. Rec. Perm. Ed. 1847).

District Judge Goodman appreciated the significance of this reply (Tr. 73).

That other members of the committee were aware that the Statute was not intended as a marine insurance measure, is shown by Mr. Williams' statement when he rose on the floor of the House in opposition to a proposed

amendment granting free protection under the Statute to a limit of \$3,000 and said:

“The Government will be furnishing *three kinds of insurance* if this legislation passes. The Government is now furnishing insurance to the service men and furnishing marine insurance, and this act proposes to furnish property insurance to those who want it.” (88 Cong. Rec. Perm. Ed. 1863).

There was no mention of the “in transit” provision in the Senate when the conference agreement was unanimously accepted by the Senate (88 Cong. Rec. Perm. Ed. 2653-2654).

Appellant points to two isolated instances on the floor of the House prior to its adoption of the conference agreement in which Mr. Smith of Ohio asked Mr. Steagall whether the current “sinkings” were covered by the Statute (Appellant’s Op. Br. 49 and 50). The first time the question is asked, Mr. Steagall replies in the affirmative (88 Cong. Rec. 2658); the second time the answer is ambiguous (88 Cong. Rec. Perm. Ed. 2660, 2661). Plaintiff argues that the word “sinkings” necessarily refers to hulls. It is submitted that the word “sinkings” is sufficiently broad to include loss of life and cargo as well as hulls. Appellant does not, we presume, contend that Mr. Steagall was advising the House that loss of life was covered by the Statute. Loss of life, as loss of hulls, was not a subject matter of the Statute. The question was but a reiteration of the inquiry of Mr. Patman in the Committee hearing as to whether the *owner of cotton* would be protected if a ship sunk, like the CITY OF ATLANTA. It was so understood by Mr. Steagall.

3. Conclusions from the Legislative History.

From earliest days, statements in the committee hearings of members of the committee, interested parties and of the draftsmen of the proposed bill, were resorted to as an aid in determining legislative intent,

2 *Sutherland Statutory Construction*, 3rd Edition,
Sec. 5009,

but the rule was to the contrary with respect to statements on the floor of Congress in the course of debates. In

Duplex Printing Co. v. Deering (1921) 254 U. S.
443, 474, 65 L. Ed. 349, 41 S.Ct. 172,

the Court stated:

“By repeated decision of this Court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body.”

While statements in Congressional debates are now held to be admissible, the reasons for their prior inadmissibility, as opposed to the admissibility of statements in committees, act as a guide in determining the *weight* to be given such statements.

These comments with respect to the weight to be given in the various stages of legislative history are particularly pertinent in view of the extent of appellant's reliance upon statements on the floor of the House.

There was no statement made on the floor of the Senate nor during the extended Senate committee hearings

to which appellant can point as indicative of an intention to cover ships. It is only on the basis of two or three unrelated and misleading remarks made on the floor of the House that Appellant supports its position that ships were within the Congressional purpose.

The inferences drawn by appellant from these isolated remarks conflict with the essential purpose of the Act, the reasons for the insertion of the "in transit" clause and the repeatedly stated views of the committees. It is hardly conceivable that these committees of Congress or the Conference Committee would have casually determined to enlarge this statute to cover the huge field of marine insurance of ships. It was surely known to Congress in January and February of 1942 that the largest losses so far suffered from enemy action were the loss of ships. The assumption of this vast burden which would have meant an extension beyond the purposes of the statute and which was already provided for by other national legislation without extended hearings, discussion and debate on the question and the testimony of interested parties and organizations or without a single declaration that a program of free insurance for ship owners had been decided upon, is unthinkable.

While it is perhaps indisputable that no interpretation of the statute is entirely consistent with every expression of opinion and intent in the legislative history, no one could read the full legislative history and arrive at any conclusion other than that reached by the district judge. It is apparent from his opinion that Judge Goodman carefully read and analyzed this legislative history. We quote a portion of his conclusions with respect thereto:

“ * * * Certain statements on the floor of Congress might be pointed out as indicative of a difference in understanding on the part of individual Congressional members as to the true meaning ascribable to the phrase ‘property in transit’ or the purpose of its insertion in the bill by Senate Committee Amendment.

“But nowhere throughout the proceedings in Congress or in Committee is there any statement or discussion indicating a conscious Congressional intent to extend the scope of the phrase beyond that originally contemplated.

“The entire history of the legislation, viewed in the background of its origin and objectives, convincingly exhibits a general Congressional intent to extend reasonable free government protection against loss from enemy attack, to property in the United States, its territories and possessions, and to *goods* undergoing transportation between these points, until a system of paid insurance contemplated thereby had been put in operation; and to thereafter extend similar protection under contract of insurance with premium payment, except as to *goods in transit* insurable by the United States Maritime Commission. Coverage at any time by the War Damage Corporation, of the vehicle of maritime transportation,—the vessel itself,—was never within the contemplation of Congress.” (Tr. 74 and 75.)

E. The legislative history demonstrates that War Damage Corporation was not to cover what the Maritime Commission was authorized to cover.

That loss of ships was not within the purview of the statute is further proved by the fact that the legislators were consciously endeavoring to avoid duplication of the Maritime Commission’s powers. Prior to the appearance

of the Alaskan and Hawaiian delegates at the Senate Committee hearing, the question of marine coverage arose, and Mr. Jones stated categorically:

“We do not provide for Maritime Insurance.”
(Sen. Com. Hearings, 10.)

In the committee hearings, there are repeated statements concerning the undesirability of duplicating any of the coverage of the United States Maritime Commission through War Damage Corporation. Such statements were made by Congressmen, by Senators, by Mr. Jones of the R. F. C.¹⁴ The importance of avoiding duplication was stressed by Admiral Land, Chairman of the Maritime Commission, in a letter sent to the House Committee (House Com. Hearings, 56). Appellant's counsel (Op. Br. 40) concede that the legislators considered “* * * that duplication was not desirable”, but contend that since the “in transit” clause was adopted, the Senate Committee deliberately chose duplication. Admittedly, in order immediately to meet the pleas of Hawaii and Alaska, a *limited* duplication of the powers of the two agencies was adopted by the Senate, but only for that purpose. The House Committee, which used the Senate bill as the basis of its discussions, at the suggestion of the Maritime Commission, eliminated any possible duplication by the proviso:

“That such protection shall not be extended to property in transit upon which the United States Maritime Commission is authorized to provide Maritime War Risk insurance.” (House Com. Hearings, 93; House Report 2.)

¹⁴See, for example, Sen. Com. Hearings, 11, 97, 99; House Com. Hearings, 41, 43, 44, 56, 87, 88; 88 Cong. Rec. Perm. Ed. 1847.

The Maritime Commission was then¹⁶ authorized to cover American ships, their cargoes and personal effects carried in them.

There is no published record of the discussions which took place in the Committee of Conference. There is therefore no exact source¹⁷ from which to ascertain the reason for changing the amendment introduced into the House bill at Admiral Land's suggestion, so that it would read:

“Provided, That such protection shall not be applicable [after the date determined by the Secretary of Commerce under this subsection]¹⁸ to property in transit upon which the United States Maritime Commission is authorized to provide Marine War Risk insurance.”

The most reasonable explanation of the change made in conference is that it was the result of the evident uncertainty throughout the proceedings as to just what the Maritime Commission was authorized to cover and was, as the District Court so aptly put it,

“* * * that the legislators felt that by July 1, 1942, if not earlier, the Merchant Marine Act would have been so effectively amended to cover all Maritime risks as to permit of the desired withdrawal of the War Damage Corporation from any field of maritime activity.” (Tr. 74.)

¹⁶46 U.S.C.A. 1128a—At this time, there was under consideration in Congress a bill which would extend the Maritime Commission powers to foreign ships. (See opinion of the District Court, Tr. 73.)

¹⁷The Conference report makes no explanation for the change.

¹⁸The bracketed portion is the essence of the change made in conference.

There is certainly no indication that there was any reversal of the policy of simply taking care of the Hawaiian and Alaskan situation, or of the desire to avoid duplication of the Maritime Commission powers and to suddenly, without explanation, grant free insurance to ships.

Appellant at page 53 of its brief charges that the District Judge, in stating that the Clark Amendment was adopted to take care of the needs of the Delegates from Alaska and Hawaii was acting upon an erroneous assumption that goods were being transported on foreign ships between the United States and Hawaii and Alaska. Whether the law prohibiting foreign ships from carrying cargo between American ports was still in effect during the first months of the war is wholly beside the point because it is clear beyond a doubt from the committee hearings that Congress, whether erroneously or not, acted upon the assumption that cargo was carried on foreign bottoms to the Hawaiian Islands and Alaska, as well as elsewhere, and that the Maritime Commission had no power to provide insurance for such cargo (Sen. Com. Hearings 97, 98, 99; House Com. Hearings 41, 42, 43, 63). If the representation of the law was in error, it is of no moment because it was accepted by Congress as one reason for adopting the Clark Amendment.

F. An interpretation of the statute which would include ships would lead to absurd results.

The last section of appellant's opening brief (pp. 54 to 56) seeks to discredit the decision of the District Court on the grounds that "the purpose of the Act was to establish free protection during the free period for *all* losses sustained by property owners as result of enemy

attack'' and hence that to discriminate against ships, and possibly against trucks and trains, by not including them in the free coverage offered by W. D. C. under the ''in transit'' clause would be to ascribe to Congress captious, irrational and discriminatory action.

Land vehicles such as trucks and trains were not within the scope of the ''in transit'' clause, but would be covered by the ''property situated in'' clause. Ships were covered by the Maritime Commission statute, and the fact that the Maritime Commission may not have exercised its authority to insure ships prior to December, 1941 (Sen. Com. Hearings, 98) shows only that adequate insurance until that time was available from private companies at reasonable rates as the Commission's *power* to grant insurance was based upon a prior finding that adequate insurance was *not* obtainable from private companies at reasonable rates. (46 U. S. C. A. 1128 (a).) Ships were accordingly not discriminated against in our statutory program of war risk insurance.

On the contrary, it would have been the rankest discrimination for Congress to have given free insurance to some shipowners and to have required the owners of other American ships to pay for war risk protection. That is exactly what appellant's position would require. If the ''in transit'' clause were construed to afford coverage of ships, the whole scheme would have been meaningless and utterly haphazard. It would have been immediately apparent to the Congress which had provided for lend-lease and knew that a great portion of our Merchant Marine was carrying goods to foreign countries, that to give free protection to shipowners whose vessels were in the do-

mestic trades and *deny* such protection to all others would have resulted in great injustice and absurd results.

If Sec. 5(g) were construed as including ships, its language would restrict its coverage to vessels which happened to be within the three-mile limit of the coast of the United States or traveling between ports in the United States or between the United States and its territories or possessions or interterritorially. Ridiculous consequences would ensue.

The owner of an American ship on a voyage from the West Coast to South America via Puerto Rico would be given free insurance for part of the voyage but not for the rest. An American shipowner whose vessel was traveling between San Francisco and Seattle would have been given free war risk insurance, but another American shipowner, whose ship was en route to Vancouver, B. C., would have to pay for its protection except that during the not infrequent periods when it happened to be within the three-mile limit, and hence "situated in the United States," it would have received free protection.

Congress should not be presumed to have intended such a meaningless now-you're-insured, now-you're-not-insured situation. Furthermore, it is unreasonable to assume that Congress would intend to give free insurance solely to our ships plying between the United States and our territories or between different territories, thus discriminating against our vessels on all other voyages when, as was well known, American flag ships in substantial numbers were carrying war supplies and lend-lease goods to our allies in other countries, and were running greater risks of loss by enemy attack than vessels engaged in

domestic trade. No sensible purpose would be gained by such a discriminatory scheme.

The accepted rule of statutory construction that unreasonable, absurd, or ridiculous consequences are to be avoided compels rejection of appellant's interpretation.

50 Am. Jur. 386; *U. S. v. American Trucking Association* (1940), 310 U. S. 534, at 543, 84 L. Ed. 1345, 60 S. Ct. 1054.

Further evidence of the absurdity of appellant's position that ships should be included in the free coverage of the War Damage Corporation Act is shown by the fact that at the time that statute was under consideration Congress was advised that another agency of the government, the Maritime Commission, had already granted shipowners increases of 35% to 45% in freight rates for the purpose of offsetting "the hazard of sea transport." (House Com. Hearings, 57.) Appellant, Matson Navigation Company, had already been granted such an increase in freight rates, which increase or "surcharge" reflected "the extra cost of war risk insurance."¹⁹

Surely, after Congress had notice that one governmental agency had previously authorized shipowners to make an increase in freight rates to cover the cost of either purchasing war risk insurance on their ships or providing self-insurance for such risks, it would be unreasonable to impute to Congress the intention to provide simultaneously, through another governmental agency, complete relief (by giving them free protection until July 1, 1942) for the same shipowners of the risks for which they had already been allowed compensation for assuming.

¹⁹Docket No. 610, 2 U.S.M.C. 622 at 623.

G. Aside from any general power to make exceptions, the interpretation of the statute by the War Damage Corporation as not including ships is entitled to weight.

War Damage Corporation, the agency which fostered and promoted the statute, and which was charged with its administration, properly interpreted the "in transit" provision as not being intended to have application to vessels (Tr. 7) and, in order to set at rest any contention that vessels, such as the LAHAINA, were within the purview of the statute, exercised its authority to make general exceptions, interpreting that power as authorizing exceptions as to types of property and pursuant thereto, excepted ships, other than those in course of construction or used only for storage, from protection.²⁰

The interpretation of the statute by the agency charged with its administration is persuasive in arriving at the true meaning of the statute and is entitled to great weight by this Court in its determination of that meaning. This is particularly so where, as here, the interpretation is substantially contemporaneous with the passage of the statute and is by the agency which fostered, promoted and steered the bill through Congress.

The recent Supreme Court decisions, following this established rule, are legion. In

Billings v. Truesdell, (1944) 321 U. S. 542, 64 S. Ct. 737, 88 L. Ed. 917,

the Court was required to interpret sections of the Selective Service Act of 1940. Following the passage of the Act, the Director of Selective Service had issued certain

²⁰The "general exceptions" clause and War Damage Corporation's administrative action pursuant thereto, is discussed in full under Section II of this brief.

regulations relative to the provisions under consideration. The Court said that the "Selective Service regulations support our interpretation of the Act" and

"* * * the interpretations of an act of Congress by those charged with its administration are entitled to persuasive weight."

In

U. S. v. American Trucking Association (1939) 310

U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059,

both the I. C. C. and the Wage and Hour Division of the Department of Labor had interpreted the provisions of the Fair Labor Standards Act under consideration by the Court. The Court said:

"In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."

In

Adams v. United States (1943) 319 U. S. 312, 63

S. Ct. 1122, 87 L. Ed. 1421,

the Court said,

"These agencies cooperated in developing the act and their views are entitled to great weight in its interpretation. * * *" (p. 1423.)

and in the recent case of

Commissioner v. South Texas Lumber Co., (1948)

68 S. Ct. 695, 92 L. Ed Adv. Op. 631,

the Court stated the rule with respect to administrative regulations construing a statute, saying, p. 698:

“* * * they constitute contemporaneous constructions by those charged with administration of these statutes *which should not be overruled except for weighty reasons.* * * *”

H. The plain meaning of the language of the Statute excludes ships.

Appellant rests heavily on the position that the literal words of the Statute include the loss of the LAHAINA. We shall, in this subdivision of the brief, take issue with the appellant's interpretation of the literal meaning of the Statute. But even if we were to assume for purposes of argument that appellant's position with respect to the literal meaning of the words used is correct, the courts have found that general words used in a statute frequently cannot be given their broadest meaning without defeating the legislative purpose. From the days of Chief Justice Marshall to present times our courts have seen the need of rejecting the literal meaning of statutes in order to give them the sense desired by Congress.

“It is manifest that these arguments rest entirely upon the letter of the statute. They take no account of the fact that its application in the circumstances under consideration is foreign to its purpose; * * *

“Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. In *U. S. v. Palmer*, 3 Wheat. 610, 631, 4 L. Ed. 471, 477, Chief Justice Marshall, in construing the Act of Congress of April 30, 1790, Sec. 8, * * * relating to robbery on the high seas, found that the words ‘any person or persons’ were ‘broad enough to com-

prehend every human being', but he concluded that 'general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.' * * *"

Sorrells v. United States (1932), 287 U. S. 435 at 446, 77 L. Ed. 413, 53 S. Ct. 210.

1. Appellant's interpretation of the plain meaning of the words is erroneous.

On pages 7 to 12 of Appellant's Opening Brief, the contention is made that the phrase in subsection (b), "loss or damage to any *such property*," (upon which Matson must base its claim), and the phrase in subsection (a), "*to such property in transit*" necessarily relate back to the isolated phrase "property, real and personal", and embrace every species of property, including ships.

But the phrase "property, real and personal" cannot be isolated from the sentence in which it is contained. The full sentence is:

"The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to *property, real and personal*, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), *with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable.*"

It will be observed that the sentence refers to the protection against loss of or damage to property, real and personal, with two qualifications: (1) loss of property,

real and personal, *which may result from enemy attack*, and (2) loss of property, real and personal, * * * *with such general exceptions* as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable. Appellant would not and does not contend that the first qualification should be disregarded, and hence that loss of or damage to property, real and personal, *from any cause*, is protected, and, by the same token, appellant cannot validly contend that the antecedent "property, real and personal" can be divorced from the qualification "with such general exceptions."

Ships as well as certain other classes of property were excluded by general exceptions promulgated by War Damage Corporation.

An analogous situation arose in connection with the provisions of the War Risk Insurance Act of 1917. That statute provided, among other things, that "any person in the active service on or after the 6th day of April, Nineteen Hundred and Seventeen, while in *such service* and before the expiration of 120 days from and after such publication, becomes or has become permanently and totally disabled * * * without having applied for insurance, shall be deemed to have applied for and to have been granted insurance. * * *"

In the case of

Nieves v. United States, 160 F. (2d) 111 (1947,
CCA Dist. Col.),

claim was filed on behalf of an ex-soldier who enlisted in the Army February 26, 1915, became permanently disabled February 13, 1917, and was discharged from the Army April 12, 1917. Claimant contended that, in accordance with the plain language of the statute, he was "in

the *active service* on or after the 6th day of April, 1917” as well as prior thereto; that admittedly he became totally and permanently disabled while in active service, and accordingly was entitled to automatic coverage. The claimant’s interpretation depended upon relating “while in such service” back to the isolated phrase “active service,” similar to that which appellant would do in relating the phrase “such property” back to the isolated words “property, real and personal.” By so doing, claimant came within the statute. The Court held, however, that the word “such” could relate back only to the entire phrase “in the active service on or after the 6th day of April * * *” and accordingly as claimant had not suffered the disability after the 6th day of April, even though it was suffered in active service, he was not covered by the statute. The Court’s opinion in this regard is as follows:

“The word ‘such’ is restrictive in its effect and obviously relates to an antecedent. In its context here, it refers to a specific kind of service—not just any active service—previously mentioned in the statute. The only service mentioned in the Act before the use of the word ‘such’ is ‘active service on or after the sixth day of April, nineteen hundred and seventeen.’ ”

2. The phrase “property in transit” in insurance terminology relates to things carried, but not to the vehicle of carriage.

As the LAHAINA is admittedly not “property situated in the United States,” Matson must necessarily bring its loss within the language “property in transit.” That phrase is not ordinary, usual or every-day language. Its “plain meaning” must be derived from its setting. Its setting is in a statute dealing exclusively with the subject

of insurance, and, with respect to the phrase itself, in a clause relating to marine insurance. The phrase has a definite and universal meaning in insurance. As so interpreted, the language "property in transit" relates to cargo and articles transported or carried, but not to the conveyance.

The familiar precept of statutory construction that words, having both a popular and a business meaning, when used in a statute dealing with such business, are presumed to have been used in the meaning as understood in that business,²² was adopted and used by this court in

Carter v. Liquid Carbonic Pacific Corp. (1938 CCA 9) 97 F. (2d) 1.

A tax was levied against the sale of carbonic acid gas for use in making beer. The tax was properly assessed if beer was a "carbonated beverage." It was conceded that carbonic acid gas was used in beer and, after referring to dictionaries and reference books indicating that beer is a "carbonated beverage" within the popular meaning of that term, this Honorable Court nevertheless concluded that beer is not a "carbonated beverage" within the meaning of the revenue statute, as, in accordance with testimony produced at the trial, beer is not considered a "carbonated beverage" in the beverage trade. The opinion states, page 3:

"At the trial the appellee produced five witnesses, all of whom were qualified as experienced either in the manufacture of beer or of soft drinks. These witnesses testified that the word 'beer' has a *definite meaning* in the beverage trade as does the term 'car-

²²See 50 Am. Jur. 438; 2 *Sutherland Statutory Construction*, 3d Ed., Sec. 4919, p. 437.

bonated beverages'; that the term 'carbonated beverages' in trade usage does not include 'beer.' No evidence contradictory to that just summarized was introduced.

"Since we are dealing with a tax which is directed at a particular industry, this definite proof of a trade usage as to the term 'carbonated beverages' calls into application the familiar rule that commercial and trade terms having a uniform and definite meaning in commerce and trade will be interpreted accordingly.

The Supreme Court in

O'Hara v. Luckenbach Steamship Co. (1926), 269

U. S. 364, 46 S. Ct. 157, 70 L. Ed. 313,

in interpreting the words "divided into * * * watches" as used in the Seaman's Act of 1915, said, p. 316:

"In this conclusion we are fortified by the consideration that the legislation deals with seamen and the merchant marine and, consequently, the phrase 'divided into * * * watches' is to be given the meaning which it had acquired in the language and usages of the trade to which the act relates, * * *"

The rule that the language of statutes which are concerned with a particular business should be interpreted in accordance with the meaning given to the terms by men engaged in the business was also adopted in

Travelers' Equitable Ins. Co. v. Commissioner of

Internal Revenue, 22 B. T. A. 784,

and in

Massachusetts Protective Ass'n. v. United States

(1940, C. C. A. 1), 114 F. (2d) 304,

in interpreting the term "unearned premium," used in the Internal Revenue Code in accordance with the meaning

given the term by the testimony of insurance experts. The First Circuit Court of Appeals said,

“* * * And where the applicable section deals with a particular trade or business, as insurance, the technical insurance terms must be considered to be used in the sense in which such terms are generally used or understood in the insurance business * * *”

Section 5(g) of the R. F. C. Act is an insurance statute. It was originally proposed by Mr. Jesse Jones, the Federal Loan Administrator, after consultation with insurance executives (Sen. Com. Hearings, 7; House Com. Hearings, 19). The War Damage Corporation was originally formed as “War Insurance Corporation.” Insurance executives were in consultation with the Federal Loan Administrator while the bill was before Congress for discussion (Sen. Com. Hearings, 8, 73). The bill was initially drawn “* * * with the distinct purpose of being able to employ the insurance companies * * *” (Sen. Com. Hearings, 71). Insurance representatives testified at the hearings (Sen. Com. Hearings, 52; House Com. Hearings, 38). The British War Damage Insurance program was studied in committee (Sen. Com. Hearings, 73). The statute authorizes and contemplates the issuance of insurance policies and insurance executives were regularly and systematically consulted in its administration (Tr. 326, 327).

“In transit” is language in general usage in the insurance business, and being employed in a statute dealing with insurance, under the authorities above referred to takes the meaning recognized in the business. Representative Ploeser, in referring to a provision originally placed in the House version of the bill giving free insurance to a limit of \$15,000, stated:

“The language is very ambiguous, but I thought it would be *interpreted in accordance with normal insurance practice.*” (88 Cong. Rec. Perm. Ed. 1848.)

This statement is indicative of the treatment to be given the entire Statute.

While the District Judge was of the opinion that the testimony of insurance men was of little value in his determination of the meaning of the Statute, it is apparent from his decision that he considered it clear that “property in transit” does not include the carrying vessel, without the necessity of resorting to the testimony of the experts. We believe, however, that this testimony is of compelling force in assisting the court in determining the meaning of the statutory language and in demonstrating the reasonableness of the administrative determination by the War Damage Corporation in not providing protection for ships.

Leading underwriters of New York and San Francisco testified that the words “in transit” are universally understood in the insurance world to have the meaning accorded them by War Damage Corporation.

Mr. Harold L. Wayne, President of Albert Wilcox & Co. of New York, who, at the time of his testimony, was manager of the Inland Marine Underwriters’ Association and of the Inland Marine Insurance Bureau, stated that he had heard the term “in transit” used in connection with insurance all the years he had been in business and that the words were used to describe peril assumed by underwriters on goods while such goods were being transported but not the vehicle of carriage.

“Q. Can you tell whether the terms ‘in transit’ are used in connection with insurance of a vehicle or ship?

A. Never unless the vehicle or the ship is to be transported on another vehicle from one place to another place, such for example as the transportation of a yacht or motor vessel from its place of manufacture to its seaport or place of sale." (Tr. 277).

He further said that this would hold true likewise of an airplane. (Tr. 277.)

Mr. Wayne's testimony carries particular force because he was fully familiar with the field of commercial war risk insurance during the war, set up the operations of the organization for the War Shipping Administration for clearing with the War Risk Re-insurance Exchange and was Marine Representative of the commercial companies committee for the War Damage Corporation (Tr. 279). Mr. Wayne helped prepare insurance forms for the War Damage Corporation which itself issued "in transit" policies. Those policies never covered the hulls of ships or any vehicles (Tr. 282).

Mr. M. M. Pease, who had 30 years experience in the marine insurance business and was American Manager of the British & Foreign Insurance Company, similarly testified that he had never heard of ships on a voyage spoken of as "in transit" but that this term was used to designate goods that a ship carries (Tr. 265, 266).

Howard W. Cann, Manager of the Railroad Insurance Association, a combination of fourteen insurance companies insuring properties and liabilities of railroads for various perils, confirmed that the words "in transit" were not used in connection with transporting vehicles but only with respect to things carried. He knew of no conveyances that are insured as "in transit," testifying:

"Q. Can you tell us whether those terms are used in connection with the insurance of rolling stock?

A. Not generally; only in one specific case that I can think of.

Q. What is that case?

A. At the present time practically all railroads of the country are changing from steam power to Diesel power. When a Diesel locomotive is purchased and delivered to the purchasing railroad that locomotive may travel on its own wheels over tracks, but not under its own power, being drawn in a train with other cars and under a bill of lading just the same as any other merchandise in transit. That is all I can think of.

Q. That is the only time, when a locomotive would be regarded as property in transit, when it is not under its own power, but when it is being conveyed, is that right?

A. That is correct.

Q. Are trains in operation insured as property in transit?

A. No."

Mr. Fred Galbraith, Pacific Manager of the Marine Office of America, who had served as a director of the Board of Marine Underwriters of San Francisco, stated:

"Q. Are the terms 'in transit' used in connection with the insurance of the hull of the ship?

A. No." (Tr. 146).

The same usage was established by Mr. A. B. Knowles, President of A. B. Knowles & Co., marine general agents at San Francisco, and former President of the San Francisco Board of Marine Underwriters, and by Mr. George Inselman (Tr. 249) of the Marine Office of America, New York.

Surely, if testimony of these executives in the insurance world was incorrect or too positive in declaring that the

words "property in transit" in the parlance of the insurance business did not embrace a ship, other, experts would have been produced by our opponents. This was not done. Mr. Prentiss, a San Francisco insurance broker, the only one who testified in rebuttal on this point, merely stated that in the body of certain insurance policies the word "property" was used to refer to a ship, its tackle, apparel and equipment. He also agreed that referring to a ship as "in transit" was not an insurance expression but said that he would understand what was meant by the term (Tr. 181).

The other means by which appellant endeavored to counteract this clear and powerful testimony as to the meaning and use of "in transit" was through illustrations as to the occasional usage of "in transit" in non-insurance situations such as in a casualty report or in its peculiar use with respect to canals.

The testimony of these insurance experts as to the meaning of the language "property in transit" used in the Statute, is in exact harmony with the meaning which the legislative history shows should be attributed to the language. It would be manifest error to accept appellant's assertion that the "plain language of the Statute" includes ships.

I. Resort to legislative materials in interpreting the Statute is proper.

Thus the language employed in the Statute and the legislative history, both with respect to the general purpose and objects to be attained by the Statute and also with respect to the specific language "property in transit," exclude the loss of the LAHAINA.

Appellant argues, to the contrary, that the language of the Statute is unambiguous and therefore it is improper to resort to legislative history for interpretation, except to the extent that it may be used as a guide to the general policy of the Statute.²³ But under the decisions upon which appellant relies, even if statutory language appears to be clear and unambiguous, the legislative history is resorted to to ascertain whether the literal meaning was intended.

In,

Jones v. Liberty Glass Company (1947), 332 U. S. 524, 92 L. Ed. Adv. Op. 195, 68 S. Ct. 229 (Op. Br. 8),

the Court resorted to the legislative history, saying:

“That this ordinary meaning is one intended by the authors of Sec. 322(b)(1) is quite evident from the legislative history which we have detailed. * * *” (p. 199).

The same may be said of the case of

Browder v. U. S. (1941), 312 U. S. 335, 85 L. Ed. 862, 61 S. Ct. 599 (Op. Br. 8).

Although in

Helvering v. City Bank Co. (1935), 296 U. S. 85, 80 L. Ed. 62, 56 S. Ct. 70 (Op. Br. 18),

the Court *says* it is not at liberty to resort to committee reports to construe plain language, the fact is, as shown from the opinion, the Court did examine committee reports although it did not follow them. And in

United States v. Mo. Pac. R.R. (1928), 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133 (Op. Br. 19),

²³We agree that legislative history may *also* be used as a guide to general policy but we assert that it may be used equally to interpret the language of the Statute.

the Court examined the legislative history but found that "appellants' construction is not supported by the legislative history."

The majority in

Packard Company v. Labor Board (1947), 330 U. S.

485, 91 L. Ed. 1040, 67 S. Ct. 789 (Op. Br. 18), a five to four decision,²⁴ did refuse to examine the legislative materials as it considered the word "employee" unambiguous and applicable to foremen. The minority had no hesitation in doing so, saying:

"When we turn from the act to the legislative history, we find no trace of congressional concern with the problems of supervisory personnel. * * *" (p. 1054).

While we do not concede appellant's premise as to the "plain meaning" of the Statute, it is settled that the legislative history may be and should be examined and used by the courts whenever it will be of assistance in determining the intent with which and the purposes for which the legislators employed the particular language and consequently the meaning thereof and that this should be done irrespective of "how clear the words may appear on superficial examination." In doing so courts not infrequently find that general language used by the legislators was intended to have a restrictive meaning.

There is abundant support for this rule in decisions of highest authority:

In

U. S. v. American Trucking Association (1940), 310

U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059,

²⁴The dissenting opinion of Mr. Justice Douglas was concurred in by Chief Justice Vinson and Mr. Justice Burton and, with respect to the part herein referred to by Mr. Justice Frankfurter.

the Supreme Court, on careful examination of the legislative history, adopted this principle in limiting the word "employees" in the Motor Carrier Act to employees whose activities affect the safety and operation of the vehicles. Appellant has quoted a portion of the court's rules for interpretation of the language of a statute on page 20 of its brief. While we are not in disagreement with the rule quoted by appellant, we believe that the essence of the principle applied by the Court requires quotation of the paragraph immediately preceding and the sentence immediately following the quotation taken by appellant:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the *intent* of Congress. There is no invariable rule for the discovery of that intention. *To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation* (p. 1350).

* * * * *

"* * * When aid to construction of the meaning of words, as used in the statute, is available, *there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination.*" * * * (p. 1351).

In

U. S. v. Dickerson (1940), 310 U. S. 554, 84 L. Ed. 1356, 60 S. Ct. 1034 (Op. Br. 21),

the Court said, page 1362:

"The respondent contends that the words of Sec. 402 are plain and unambiguous and that other aids

to construction may not be utilized. It is sufficient answer to deny that such words when used in an appropriation bill are words of art or have a settled meaning. See *United States v. Perry*, 50 F 743, 748 (CCA 8th). The very legislative materials which respondent would exclude refute his assumption. *It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words.* Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases it will not be permitted to *control* the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co. v. United States*, *supra* (278 US at 48, 73 L ed 177, 49 S Ct 52). *The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.* These lead to the conclusion that the judgment of the court below must be reversed.”

Harrison v. Northern Trust Company, 317 U. S.

476, 87 L. Ed. 407, 63 S. Ct. 361 (Op. Br. 18),

is another example of the Supreme Court’s resort to legislative history to interpret the wording of a statute irrespective of the apparent clarity of the statute. The Court, in reversing, said of the Circuit Court’s decision:

“In so doing the court below refused to examine the legislative history of Sec. 807 on the ground that the section was unambiguous.

“*But words are inexact tools at best and for that reason there is wisely no rule of law forbidding re-*

sort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.' * * *” (pp. 410-411).

U. S. v. Carbone (1946), 327 U. S. 633, 90 L. Ed. 904, 66 S. Ct. 734,

illustrates the accepted tenent of statutory construction that despite plain, general and seemingly all-inclusive language in a statute, the legislative history may be examined to interpret that language in accordance with the intent and purpose of the statute. The Court had before it the interpretation of the *Kickback Act*, 40 U.S.C.A. 276(b) which provided, in part:

“*Whoever* shall induce any person employed in the construction * * * to give up any part of the compensation * * * by force, intimidation * * * or by *any manner whatsoever*, shall be fined not more than \$5,000 * * *”

Although the activities of a union agent fell squarely within the language of the statute, the Court determined from the legislative history that Congress did not intend to include union agents and union action and stated:

“* * * not every person or act falling within the literal sweep of the language of the Kick-Back Act necessarily comes within its intent and purpose. That language must be read and applied in light of the evils which gave rise to the statute and the aims which the proponents sought to achieve. The interpretative process would be abused and the legislative will subverted were we to deal with the broad language of this statute in disregard of the narrow problem of kickbacks which Congress sought to remedy.”

From this review of decisions this Court should have no hesitation in resorting to the legislative history of the War Damage Corporation Statute, both for purposes of determining its general purpose and of interpreting specific language. In doing so, we believe this Court will find that the conclusion reached by the District Court is inescapable.

II. LOSSES OF THE TYPE APPELLANT HAS SUFFERED WERE VALIDLY EXCEPTED BY THE WAR DAMAGE CORPORATION.

A. Statement of applicable exception.

Appellant's loss of the LAHAINA falls directly within a class of property excepted by War Damage Corporation in accordance with express statutory authority. The appellant therefore has no right to recover.²⁵

Subsection (b), the free protection section, is expressly made subject to the authorizations and limitations of subsection (a) which includes the authorization to War Damage Corporation to provide protection for property real and personal "with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable." Pursuant to this specific statutory authority the Board of Directors of the War Damage Corporation on October 2, 1944 (approximately three months before plaintiff presented its claim)

²⁵Appellant states that this defense was "disregarded" and "ignored" by the trial court (Op. Br. 8, 56). The District Court said "If defendant's interpretation of the statute was correct [the Court held that it was] it obviously acted properly in denying plaintiff's claim and the issue as to the scope of its statutory power to make general exceptions from coverage of certain property becomes irrelevant" (Tr. 66).

adopted a resolution (Tr., 368 to 374) which excepted from protection (among numerous types of property):

“All vessels and watercraft wherever situated (and their tackle, apparel, fittings, equipment, stores, ordnance, boilers and machinery),” other than vessels used for storage or housing, or vessels under construction, or laid up pleasure craft.²⁶

The exception is made expressly applicable to *all* of Section 5(g); that is, to both the paid and the free protection. Mr. R. C. Goodale, General Counsel of the War Damage Corporation, testified:

“The Resolution was almost wholly declaratory of a practice that had existed from the commencement of the activity of the Corporation. Its purpose was mainly to place of record and formalize the action we had already carried into effect in the actual day-to-day administration of the Act.” (Tr. 323.)

In the District Court, appellant sought to avoid the clear-cut defense of the resolution by asserting that the “general exceptions” were limited to area or geographical exceptions and that an interpretation which would authorize the making of exceptions to types of property would invalidate the statute as an unconstitutional delegation of legislative authority.

²⁶Much was sought to be made in the District Court of the allegedly illogical position of War Damage Corporation in (1) asserting that ships were not covered by the statute, and (2) acting to except ships from its protection. The answer to this contention is, of course, that appellee in adopting the Resolution making general exceptions was merely clarifying its position and setting at rest any doubts which uninformed claimants might have as to the scope of the statute.

B. The "General Exceptions" clause relates to exceptions as to types of property.

The answer to the assertion that the general exceptions clause is limited to exceptions to areas is found in the language of the statute itself, which at a later point expressly delegates to War Damage Corporation the specific authority to make geographical exceptions. Surely Congress would not use the general language of the exceptions clause for the sole purpose of conveying authority covered by a specific provision. This is borne out by the history of the development of the statute.

In support of appellant's contention, counsel quoted from Senate Report No. 1012 prepared by Senator Maloney, which, in referring to the general exceptions clause of the Senate Bill, states that the provision was added by the committee "to permit the corporation to suspend consideration of the problem as to areas in which enemy occupation or other factors make it temporarily impossible to ascertain the situation." This report was made February 2nd, the same day the hearings in the House Committee commenced. The House Committee used as the basis for its discussion the bill reported out of the Senate, but the bill later reported out of the House omitted the Senate's general exceptions clause, although it did have a clause permitting exceptions as to areas, as follows:

"War Damage Corporation, with the approval of the Federal Loan Administrator, may suspend, restrict, or otherwise limit the provision of such protection in any area as it may determine necessary or advisable in consideration of the loss of control by the United States or other factors making it impossible or impracticable to provide such protection therein." (House Report, p. 2.)

The similarity of this express provision in the House bill and of the statement of the reason for the Senate's general exception clause quoted by appellant from the Senate report is so striking as to leave no doubt as to the origin of the House provision. The House obviously adopted as part of its bill the *reason* given by the Senate report for the Senate's general exceptions clause, rather than to adopt the clause itself.

If all that was ultimately to be intended by the general exceptions clause was an exception for such areas as the United States may lose control of, the simple procedure for the conference committee should have been to include the specific statement to that effect in the House bill and strike out the "general exceptions" clause of the Senate bill. They did the former, but not the latter, thus making it obvious that *the general exceptions clause in the bill as finally passed not only was not limited to area exceptions, but, in fact, no longer referred to areas.*

As previously pointed out, exceptions as to the type of property to be covered were indigenous to the entire scheme originating with the press releases which enumerated specific exceptions. It is apparent throughout that it was the intention that the War Damage Corporation would fill in the details,²⁷ including the classes of property to be covered. Senator Taft, when the bill was up for consideration on the floor of the Senate following the Committee Report, presented an extended discussion, concluding with:

"Mr. President, I feel that we should pass the bill. The whole question of insurance is so complicated, the details are so countless, and there are so many

²⁷Sen. Com. Hearings, 72, 91, 93; House Com. Hearings, 45, 51.

things to be considered that I do not object to leaving it to the War Damage Corporation, after we lay down the general principle, to work out the complicated details." (88 Cong. Rec. Perm. Ed. 964.)

Both the bills reported out of the House and the Senate committees limited the type of property which the War Damage Corporation was authorized to protect to "tangible" property. Appellant contended in the trial court that the elimination of the word "tangible" acted as a rebuff to the Federal Loan Administrator's exceptions contained in the press releases since those exceptions were largely of intangibles. On the contrary, the process by which the word "tangible" was eliminated is a striking illustration of the fact that it was always contemplated that the War Damage Corporation would determine types of property to be covered and not to be covered.

The limitation to tangibles was abandoned by an amendment introduced from the floor of the House at the time the committee bill was being considered. This amendment was introduced by Mr. Spence, a member of the House Committee. He and other members of the House entertained no doubt but that this amendment was for the purpose of broadening the power of the War Damage Corporation to determine the types of property to be covered. Following the introduction of the amendment, the following discussion occurred:

"Mr. Rolph. As I understand the gentleman's amendment, it would take care of those risks I interrogated the Chairman about earlier this afternoon.

Mr. Spence. All of those risks may be taken care of subject to rules and regulations of the War Damage Corporation.

Mr. Rolph. Tangible and intangible?

Mr. Spence. If they want to include them by rules and regulations they can include the risks the gentleman mentions. *It is all up to the Corporation what they desire to do*, and in the passage of this amendment you do not tie their hands, but you let them operate as they judge to be the best interests of the American people.” (88 Cong. Rec. Perm. Ed. 1859.)

The statement that “It is all up to the Corporation * * * ” with respect to inclusion of intangibles refutes appellant’s claim that all exceptions were intended to relate only to areas. Mr. Spence also read into the record at the same time a statement by Mr. Claude Hamilton, General Counsel for Reconstruction Finance Corporation, active in preparing and promulgating the statute, in which Mr. Hamilton stated, in part:

“It seems appropriate, then, to permit the Administrator to establish the various classifications of property to be covered as necessity and experience may require or permit. * * * ”

* * * * *

“It may, admittedly, prove infeasible to provide any protection for some classes of property. That is left to the discretion of the Administrator. It is the purpose of this amendment merely to prevent the preclusion of any single class of property from such benefits. (88 Cong. Rec. Perm. Ed. 1860.)

Analysis of the final statutory language itself makes it clear that the “general exceptions” clause refers directly to types of property. The only items preceding the “general exceptions” clause and to which it could have reference are (1) “property, real and personal” and (2)

“which may result from enemy attack.” As the latter was the whole object of the Act, “general exceptions” refers to “Property, real and personal.”

The foregoing eliminates any doubts as to whether War Damage Corporation was authorized to promulgate general exceptions as to types of property. That the exceptions with respect to vessels, as set forth in the resolution of the Corporation, were reasonable and consonant with the language and purposes of the statute and supported by the legislative history, is amply shown by the materials contained in Section I of this brief.

C. Authorization to War Damage Corporation to determine types of property to be covered does not constitute an unlawful delegation of legislative power.

Appellant further contended in the District Court that if the power to make general exceptions extended beyond area exceptions and included exceptions as to types of property, the statute constituted an unlawful delegation of legislative power to the administrative agency. If the statute were thus held to be unconstitutional, appellant would have no basis for recovery. It, accordingly, argues that the statute, to avoid unconstitutionality, should be construed as not authorizing any general exceptions except as to areas. The inconsistency of Matson's position is demonstrated by its conceding that the statute constitutionally authorizes exceptions to areas.

Appellant's position is based upon the decisions of the United States Supreme Court in the two N.I.R.A. cases:

Panama Refining Co. v. Ryan (1934), 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; and

Schechter Poultry Corp. v. U. S. (1935), 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837,

in which the Supreme Court, for the first, and it is believed the only time, held a Federal statute invalid on the grounds of unconstitutional delegation of legislative authority. In both cases the question of imposition of penal provisions of the N.I.R.A. statutes by an administrative agency was involved and the Court determined that inadequate standards, under the circumstances, had been set up, upon which the administrative agency was to act. In the ten years following the decision in the *Ryan* case, the Court came to a realization of the utter impracticability of Congress going into detail with respect to the administration of statutes setting up governmental agencies and activities and in the two O.P.A. cases:

Bowles v. Willingham (1944), 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892; and

Yakus v. United States (1944), 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 835,

upheld, against an attack of unlawful delegation of legislative authority, the O.P.A. Act. The only standards provided for the determination of regulations as to commodity prices dealt with in the *Yakus* case was that they should be, in the judgment of the Administrator, "generally fair and equitable" and "effectuate the purposes of the Act." In the *Willingham* case, the Administrator was granted the power to fix maximum rents and the only standard prescribed for his action was that "in his judgment," they should be "generally fair and equitable."

The modern doctrine promulgated in these cases is concisely stated by the court in the *Willingham* case, page 903, as follows:

“* * * Congress does not abdicate its functions *when it describes what job must be done, who must do it and what is the scope of his authority.* In our complex economy that indeed is the only way in which the legislative process can go forward. * * *”

Mr. Justice Roberts wrote a dissenting opinion in both of the O.P.A. cases, saying in the *Willingham* case, “Whether explicitly avowed or not, the present decision overrules that in the *A. L. A. Schechter Poultry Corp.* case” (p. 917). In his dissent in the *Yakus* case he said that a comparison of the standards under the N.I.R.A. and O.P.A. read in light of what was said in the *Schechter* case, “leaves no doubt that the decision is now overruled” (p. 863). This is significant in view of appellant’s reliance on the *Schechter* case.

A new and more liberal principle that of seeking standards outside the language of the statutes in the customs and practices of the commercial world, was injected into the doctrine of delegation of legislative authority by the decision of the Supreme Court in

Fahey v. Mallonee (1947), 332 U. S. 245, 91 L. Ed. 2030, 67 S. Ct. 1552.

The Supreme Court unanimously reversed a decision of a three judge court sitting in Los Angeles which, on the express authority of the *Ryan* and *Schechter* cases, had held that Section 5(d) of the Home Owners Loan Act constituted an unlawful delegation of authority to the Federal Home Loan Bank Board in giving that Board full power to appoint a Conservator or receiver to take over Federal Savings & Loan Associations.

The Court distinguished and limited the *Ryan* and *Schechter* cases by saying:

“Both cited cases dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom.”

It then proceeded to point out that the Home Owners Loan Act did not deal broadly with all industry as did the *Schechter* case, did not set up penal provisions or establish new federal crimes and that, although there were no explicit or specific standards stated in the statute for the Board's action (a requirement of the N.I.R.A. cases), the authorization to make regulations with respect to appointment of a Conservator must be viewed in light of the established background of corporate management and banking practice, which, itself, provides the standards.

The Court said further:

“* * * But the provisions of the statute under attack are not penal provisions * * *. They do not deal with unprecedented economic problems of varied industries. They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. * * * *Banking* is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, *has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management* is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards. *A discretion to make regulations to guide supervisory action in such mat-*

ters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields'' (p. 2037).

The War Damage Corporation Statute, like the Home Owners Loan Act, does not create or authorize the creation of federal crimes nor is it concerned with penal provisions as in the *Ryan* case. It does not, as in the *Schechter* case, deal broadly with all industry, but is narrowed to insurance for damage resulting from enemy attack.

Although the War Damage Act contains adequate express standards to guide the Corporation in making its rules, regulations and exceptions, such as "reasonable protection" and to "establish uniform rates" and "estimate the average risk of loss" in addition to territorial limitations, and the statutory standard of "necessary to expedite the national defense program" contained in section 5-d (15 U.S.C.A. 606b-3) of the Reconstruction Finance Corporation Act under which War Damage Corporation was formed, under authority of the decision in *Fahey v. Mallonee*, such express statutory standards are unnecessary. The standards for the action of the War Damage Corporation may be found in the customs and practice of the insurance business with respect to the coverage to be offered, which practices are as long standing and as adequate as the external practices of the banking business relied upon by the Court for the Housing Board's appointment of a Conservator. Furthermore, the authority to adopt rules, regulations and make general exceptions was placed in a corporation which is, as the Court points out in *Fahey v. Mallonee*, subject to "generally acceptable standards" of corporate management.

While we do not believe the *Ryan* and *Schechter* cases require a holding that the power to make general exceptions with respect to property is unconstitutional, it is apparent the decisions of the Supreme Court since the N.I.R.A. cases completely set at rest any doubt which there might have been concerning the constitutionality of War Damage Corporation's construction that the "general exceptions" clause lawfully authorizes exceptions as to classes of property.

III. THE FREE PROTECTION SECTION OF THE STATUTE IS PERMISSIVE AND NOT MANDATORY. PLAINTIFF HAS NO REMEDY IN THE COURTS.

Irrespective of the interpretation of the meaning of "property-in-transit" or of the exception of vessels pursuant to the "general exceptions" clause, appellant is not entitled to a judgment because while War Damage Corporation is *authorized* to provide free protection for property within the scope of the statute it is not *required* to do so and hence judgment compelling it to do so would be improper.²⁸

A. Use of the word "may" in subsection (b) requires permissive construction.

It is by virtue of subsection (b) of Section 5-g that Matson Navigation Company is seeking a judgment to compel War Damage Corporation to pay \$615,000 for

²⁸Appellee took this position in the District Court. Appellant erroneously (Op. Br. 11) states that it was "disregarded by the Trial Court." However the Trial Court, having determined that appellant's loss was not included in the meaning of the statute, considered it unnecessary to make a determination with respect to the other issues (Tr. 67).

loss of the S.S. LAHAINA. In subsection (b) of Section 5-g, words of compulsion are strikingly lacking:

“(b) Subject to the authorizations and limitations prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such loss or damage.”

War Damage Corporation is simply permitted to provide compensation under the terms specified. This was logical as the corporation had already undertaken to provide the free protection without special sanction of Congress. Through subsection (b) Congress in effect said, “You are permitted to continue what you have already undertaken.”

The word “*may*” is used in subsection (b). “The ordinary meaning of language must be presumed to be intended unless it manifestly defeats the object of the provision.”

United States v. Thoman (1895), 156 U. S. 353, 39 L. Ed. 450, 15 S. Ct. 378.

The ordinary meaning of “*may*” is permissive and not mandatory. The statute leaves it to the discretion of the War Damage Corporation, the governmental agency empowered to administer the Act, subject to the authorization and limitations of subsection (a) of the statute, to provide the free protection. There is no reason to sup-

pose Congress intended any other meaning of "may" in subsection (b). Careful analysis of (a) and (b) discloses a studious and discriminating choice of the permissive "may" and the mandatory "shall."

Section 5-g(a) is essentially mandatory. The word "shall" is used nine times in prescribing a clear duty to establish and maintain an insurance program on a premium basis. Section 5-g(b), on the other hand, providing free protection, does not once employ "shall" or any other mandatory language. The statutory language further demonstrates that Congress used permissive and mandatory words in their usual sense. It used permissive words where it did not require that the action be taken, but where it intended an absolute duty, mandatory words were used. Hence, the statute "*directed*" the R. F. C. to continue to supply funds to War Damage Corporation. It intended no alternative. It required the R. F. C. to empower War Damage Corporation to use its funds in the manner specified, by stating "*is authorized to and shall*" but in the same sentence permitted or authorized but did not require War Damage Corporation to make exceptions by using the phrase "*may deem advisable.*" It permitted War Damage Corporation to make terms and conditions ("*may establish*"), but in the same sentence requires that the protection be made available by July 1 (*shall be made available*) and that uniform rates be determined ("*shall from time to time*"). It prescribes absolute territorial limitations by stating, "such protection *shall* be applicable only * * *," but at the same time by use of the word "may", authorizes, permits, or empowers War Damage Corporation to exercise its discretion to suspend, re-

strict, or limit protection to certain areas in which the United States may lose control.

With such a careful selection of mandatory and permissive words used in their ordinary and natural sense in close juxtaposition throughout the statute, there can be no doubt that when "may" is used in subsection (b), it is used in its ordinary sense of permission.

Subsection (b) had its origin in the comparable "free protection" provision of the House Bill with respect to losses prior to July 1, 1942. The Statement of the Managers on the Part of the House, embodied in the Conference Report, utilizing the permissive word "might" in its explanation of subsection (b) effectively answers any contention that "may" was inadvertently used in the statute.

"* * * The House amendment also provided that any such loss or damage sustained prior to the approval of the act or prior to a date determined by the Secretary of Commerce (not later than July 1, 1942) *might* be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of a premium or other charge." (Cong. Rep. 5.)

Matson contended in the District Court that "may" as used in the statute was mandatory, except that the statute permissively allows area or territorial exceptions. In support of this contention, appellant argued that the use of "may" in subsection (b) had its origin in the Senate Committee Hearings from a remark made by Mr. Claude Hamilton, General Counsel for the R. F. C., at the time Senator Danaher was proposing to inject into the bill a

provision, relative to the premium program, which would act prospectively to give free protection up to \$15,000 above which figure a premium would be charged. The words which Senator Danaher was suggesting were:

“Such protection to the limit of \$15,000 for loss of or damage to such property of any one owner *shall* be provided without payment of premium or other charge by such owner.” (Sen. Com. Hearings, 90.)

and

“Such protection in amounts greater than \$15,000 *shall* be made available * * * upon payment of * * * premium.”

Mr. Hamilton stated: “Suppose we change ‘shall’ to ‘may’ ”.

“Senator Danaher. Then you do not give automatic coverage.

Mr. Hamilton. That is right. That is a matter we think should be left to regulation, because you may have areas where you would not want it to be mandatory.” (Sen. Com. Hearings, 93).

The Senate Committee, after off-the-record discussion during recess, rejected Mr. Hamilton’s suggestion and did not change “shall” to “may.” The entire provision under discussion was omitted from the bill as finally passed.

It is hardly conceivable that the use of “may” in subsection (b) adopted by the Conference Committee from the House Bill could have its origin in a suggestion of Mr. Hamilton in the Senate Hearing which was rejected by the Senate Committee.

The quoted duologue does serve to demonstrate, however, that the legislators were cognizant of the difference between permissive “may” and mandatory “shall,” and that the ultimate selection of “may” for the free protection section (b) was not inadvertent.

B. The Rule that “may” is mandatory in certain circumstances is inapplicable. The authorities support a permissive construction.

We recognize that, as asserted by Appellant in the District Court, courts have at times given words of authorization a mandatory construction when the authorization is to a public officer to perform a statutory function for the benefit of the public or a third person. But this, like other rules of statutory construction, is merely an aid in determining the true intent of the legislature. It is not available where, as here, the intent is manifest. This was aptly pointed out by Mr. Justice White in

United States v. Thoman (1895), 156 U. S. 353, 39 L. Ed. 450, 15 S. Ct. 378.

A statute first prescribed mandatory rules for the expenditure of money by municipal corporations, and then stated:

“That any surplus of said revenue *may* be applied to the payment of the indebtedness of former years.”

The Court, after first stating the rule to which the Appellant referred, rejects the rule saying:

“But no general rule can be laid down upon the subject, further than that the exposition ought to be adopted in this as in other cases, which carries into effect the true intent and object of the legislature in

the enactment. The ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provisions.

In *Thompson v. Roe*, supra, this court, speaking through Mr. Justice Grier, observed: 'It is only where it is necessary to give effect to the clear policy and intention of the legislature that *such a liberty* can be taken with the plain words of the statute.'

In the law to be construed here it is evident that the word 'may' is used in special contradistinction to the word 'shall' and hence there can be no reason for 'taking such a liberty.' "

The parallel between the statute considered by Mr. Justice White and Section 5-g is striking.

The construction of the section of the code which follows the War Damage Corporation statute by the Court in

General Cooling & Heating Corporation v. Reconstruction Finance Corporation (1945 D. C. Fla.),

59 F. Supp. 357, Aff'd C. C. A. 5, 152 F.(2d) 655,

furnishes an exact precedent. That statute, section 606b-3, known as the Murray-Patman Act, provides:

"In order to prevent and relieve distress among dealers in articles or commodities which are rationed * * * the Reconstruction Finance Corporation, * * * is authorized to purchase or make loans upon the security of any article or commodity the sale or distribution of which is rationed under authority of the United States, subject to the following terms and conditions;"

Plaintiff, who indisputably fell within the statutory category of a dealer distressed as result of commodity rationing, asserted that he could demand as a matter of right that the Reconstruction Finance Corporation purchase certain stoves from him. Reconstruction Finance Corporation said that the entire matter was left to its discretion. The Court held with the Reconstruction Finance Corporation:

“The fundamental authority created by sec. 5h is permissive, not mandatory. Congress intended to invest R. F. C. with authority to act in these cases, but did not require it to act. * * * *The gist of the section, taken as a whole, is that R.F.C. is permissively ‘authorized’ to act,* * * *

* * * * *

“Also sec. 5h (a) (5), as originally introduced, provided that such purchases or loans ‘shall’ be made upon the request of any dealer, etc. * * * *Before enactment, this word ‘shall’ was changed to ‘may’ which further emphasizes the discretionary character of the Act*” (59 F. Supp. 359).

It is significant that this statute came before the same congressional committees, namely, Committee on Banking and Currency of each house, as did section 5(g), and at approximately the same time.

The Fifth Circuit affirmed the District Court’s decision, stating, “We agree with the lower Court that the Murray-Patman Act, 15 U.S.C.A. Sec. 606b-3(a) merely authorized, but did not require, the Reconstruction Finance Corporation to make loans and purchases of rationed commodities.”

In concluding this point,^{28a} we say that if Congress desired to make subsection (b) mandatory, it well knew how to do so. On the contrary, Congress intended to and did leave to the sound (but not unbridled) discretion of War Damage Corporation when, how, and in what manner, "subject to the authorizations and limitations of subsection (a)," it would expend its funds in extending gratuity.

C. Appellant has no remedy in the courts.

Subsection (b) being but a permissive authorization to War Damage Corporation, gives no remedy by which appellant can obtain a judgment in its suit. A proper claimant under subsection (b) may have a right to resort to the courts to correct arbitrary or capricious action by the War Damage Corporation by Writ of Mandamus or its modern equivalent. But Matson Navigation Company neither seeks, nor is entitled to seek, such a remedy.

Furthermore, the amount of recovery, if any, under subsection (b) cannot be judicially determined as the statute authorizes War Damage Corporation to provide "reasonable protection." It was contemplated that the amount of benefits, whether gratuitous or for a premium, may be less than the full loss and that

^{28a}Matson's counsel also made the contention that the word "may" in subsection (b) refers solely to the words:

"without requiring a contract of insurance or the payment of premium or other charge * * *"

and that the War Damage Corporation has required neither. If this is the construction appellant would give to subsection (b), we are at a loss to find a verb which would even authorize, let alone require, defendant to pay for any losses occurring between December 6, 1941 and July 1, 1942.

“* * * The amount of the benefit may be established at a percentage of the loss, the percentage to be fixed by the War Damage Corporation in line with experience and changing conditions. * * *” (Sen. Rep. 3).

The fact is that Congress did not write into the statute a standard of full market value as the measure of loss. Exercising its judgment authorized by the statute, War Damage Corporation in fact established a measure of loss of less than full value on certain classes of property which were covered. For loss of jewelry and furs, for example, a limitation of \$1,000 was imposed (Tr. 330). On other property, cost, rather than full market value, was adopted as a standard of “reasonable protection” (Tr. 331). In one instance, the Corporation prescribed that in determining the amount paid, allowance should be made for tax deductions for benefits obtained by claimant by reason of the loss under the excess profits tax law (Tr. 332).

The only factual data in the record relating to the value of the LAHAINA is embodied in a stipulation that “her fair cash market value” at the time of her loss was \$615,000 (Tr. 60). If ships had been within the purview of the Statute, War Damage Corporation might well have adopted some other standard, such as the lower standard of “just compensation” without enhancement by war conditions, which had previously been established by Congress in the Merchant Marine Act.²⁹

These illustrations point to the error of asking a Court to assume the function delegated by Congress to the War

²⁹46 U.S.C.A. 1242.

Damage Corporation to determine what should be "reasonable protection."

IV. APPELLANT'S LONG DELAY IN PROSECUTING ITS CLAIM CONSTITUTES A FURTHER BAR TO RECOVERY.

Subsection (b), the free protection section, provides that losses "may be adjusted as if a policy covering such property was in fact in force at the time of such damage." It is reasonable to assume that the policy to which the statute has reference is the standard policy issued by War Damage Corporation under the premium program. That policy provided that no suit may be maintained unless commenced within twelve months after date of loss (Tr. 39).

In addition to this provision of the policy, an administrative regulation of the War Damage Corporation in the form of a press release, issued December 30, 1942, provided that claims for loss of property in transit between December 6, 1941, and July 1, 1942, "should be filed with the Washington office of the War Damage Corporation on or before February 1, 1943" (Tr. 63).

Appellant failed to comply with either requirement as it first presented its claim nearly two years after the required date (Tr. 6) and did not bring suit until more than three years after the date of loss.

Appellant contended in the District Court that because War Damage Corporation's letter denying appel-

³⁰The Federal Register Act did not permit publication in the Federal Register of such an announcement. 44 U.S.C.A., sec. 305a.

lants' claim did not refer to this "technical" defense, appellee waived such defense under the authority of *Oelbermann v. Toyo Kisen Kabushiki Kaisha* (CCA 9, 1925), 3 F. (2d) 5, cert. den. 268 U. S. 693, 69 L. Ed. 1161, 45 S. Ct. 511. The rule of that case was, however, expressly disapproved by a California court on the argument of Matson Navigation Company in *Hubbard v. Matson Navigation Company* (1939), 34 C. A. (2d) 475, 480, 93 P. (2d) 845, 1939 A.M.C. 1502, and under the authority of *Erie Railway Company v. Tompkins* (1937), 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the rule of the *Hubbard* case and not the *Oelbermann* case should be followed.

On June 30, 1947, subsequent to the trial of this action, the 80th Congress enacted Public Law 132, Title II, Sec. 206 (x), (61 Stat. 209), expressly repealing the statute upon which appellants rely. The saving clause in Public Law 132, Title II, relates only to Reconstruction Finance Corporation, not to War Damage Corporation which alone ever had any authority to compensate for war losses and seems to us otherwise insufficient to preserve any right claimed by appellant under the repealed Act. We feel it our duty to bring this subsequent development to the Court's attention as it appears to us that irrespective of other issues in the case, the repeal of this statute eliminates the only basis upon which appellant has claimed the right to recover.

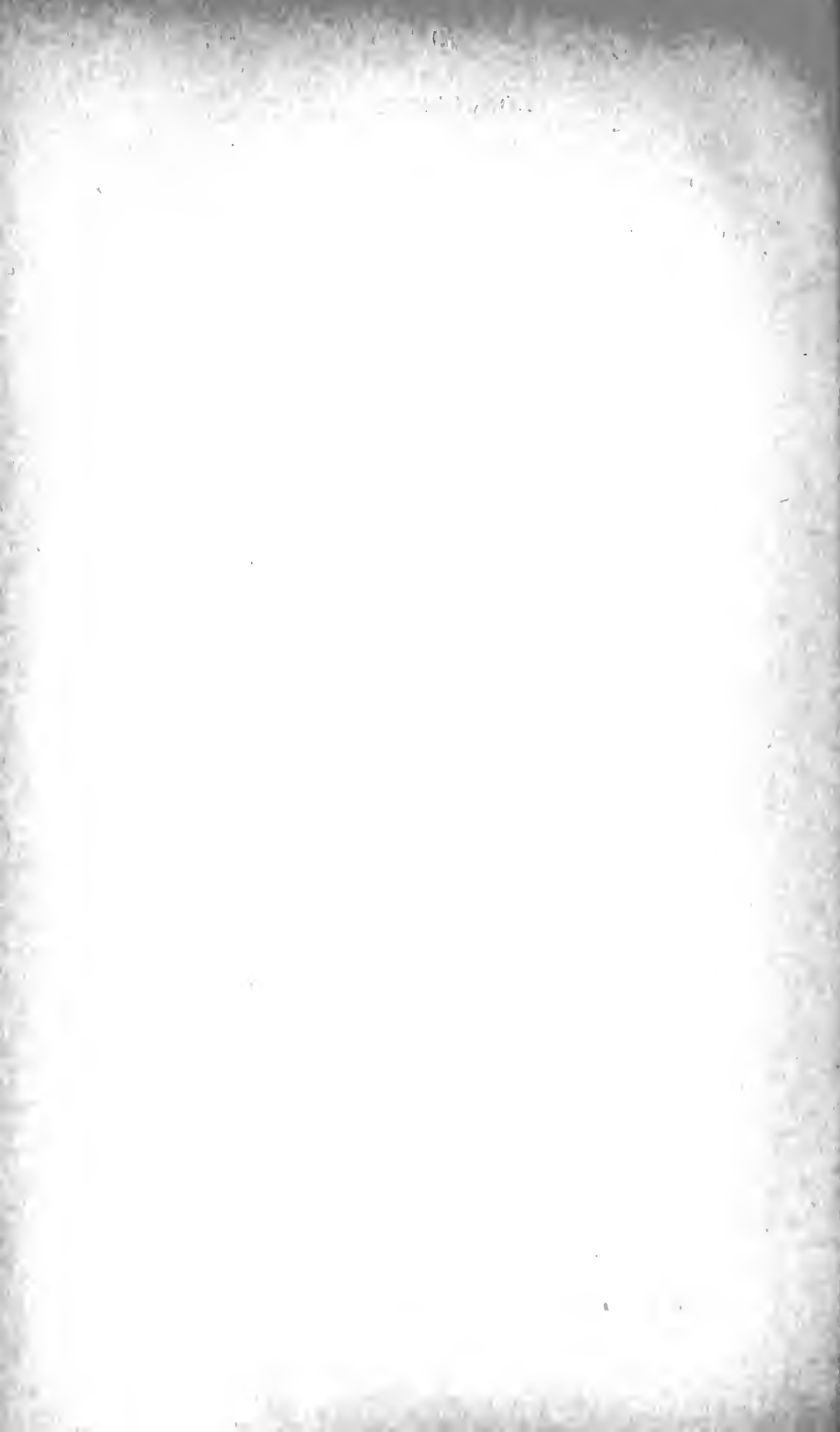
CONCLUSION.

For the reasons stated above we respectfully submit that the judgment of the District Court should be affirmed.

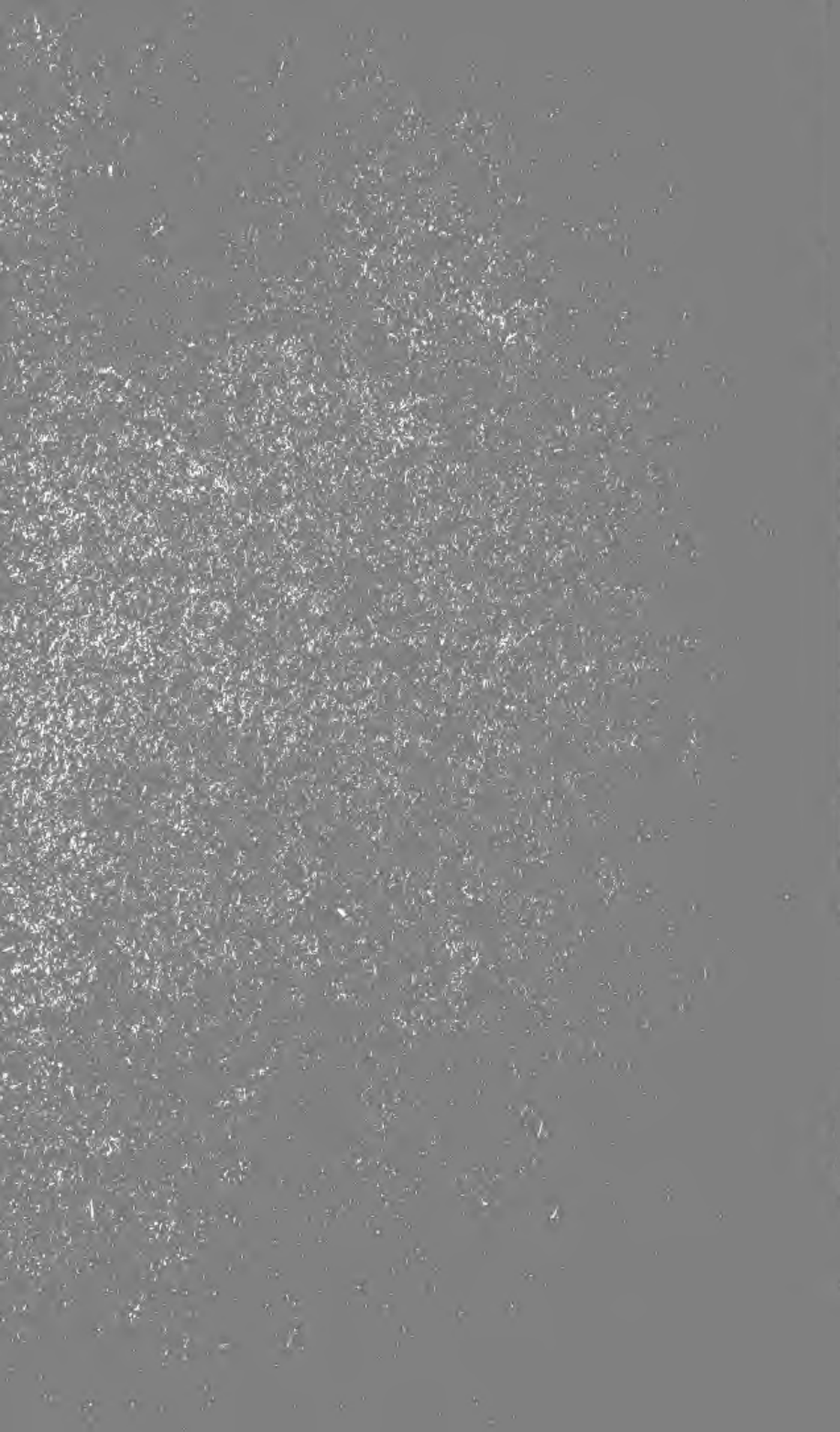
Dated, San Francisco, California,
October 1, 1948.

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(Appendix Follows.)



Appendix.



Appendix A

SECTION 5g OF RECONSTRUCTION FINANCE CORPORATION ACT AS ADDED, MARCH 27, 1942, 56 STATUTES AT LARGE 175, 15 USCA 606b-2.

*Section 606b-2. Funds for War Damage Corporation;
insurance against property injury by enemy attack.*

(a) The Reconstruction Finance Corporation is hereby directed to continue to supply funds to the War Damage Corporation, a corporation created pursuant to section 5d of this Act; and the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this subsection. Such funds shall be supplied only upon the request of the Secretary of Commerce, with the approval of the President, and the aggregate amount of the funds so supplied shall not exceed \$1,000,000,000. The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable. Such protection shall be made available through the War Damage Corporation on and after a date to be determined and published by

the Secretary of Commerce which shall not be later than July 1, 1942, upon the payment of such premium or other charge, and subject to such terms and conditions, as the War Damage Corporation, with the approval of the Secretary of Commerce, may establish, but, in view of the national interest involved, the War Damage Corporation shall from time to time establish uniform rates for each type of property with respect to which such protection is made available, and, in order to establish a basis for such rates, such corporation shall estimate the average risk of loss on all property of such type in the United States. Such protection shall be applicable only (1) to such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States, (2) to such property in transit between any points located in any of the foregoing, and (3) to all bridges between the United States and Canada and between the United States and Mexico: *Provided*, That such protection shall not be applicable after the date determined by the Secretary of Commerce under this subsection to property in transit upon which the United States Maritime Commission is authorized to provide marine war-risk insurance. The War Damage Corporation, with the approval of the Secretary of Commerce, may suspend, restrict, or otherwise limit such protection in any area to the extent that it may determine to be necessary or advisable in consideration of the loss of control over such area by the United

States making it impossible or impracticable to provide such protection in such area.

(b) Subject to the authorizations and limitations prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such damage.

Approved, March 27, 1942.



No. 11,925

IN THE

United States
Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY, a corporation,

Appellant,

vs.

WAR DAMAGE CORPORATION, a corporation,

Appellee.

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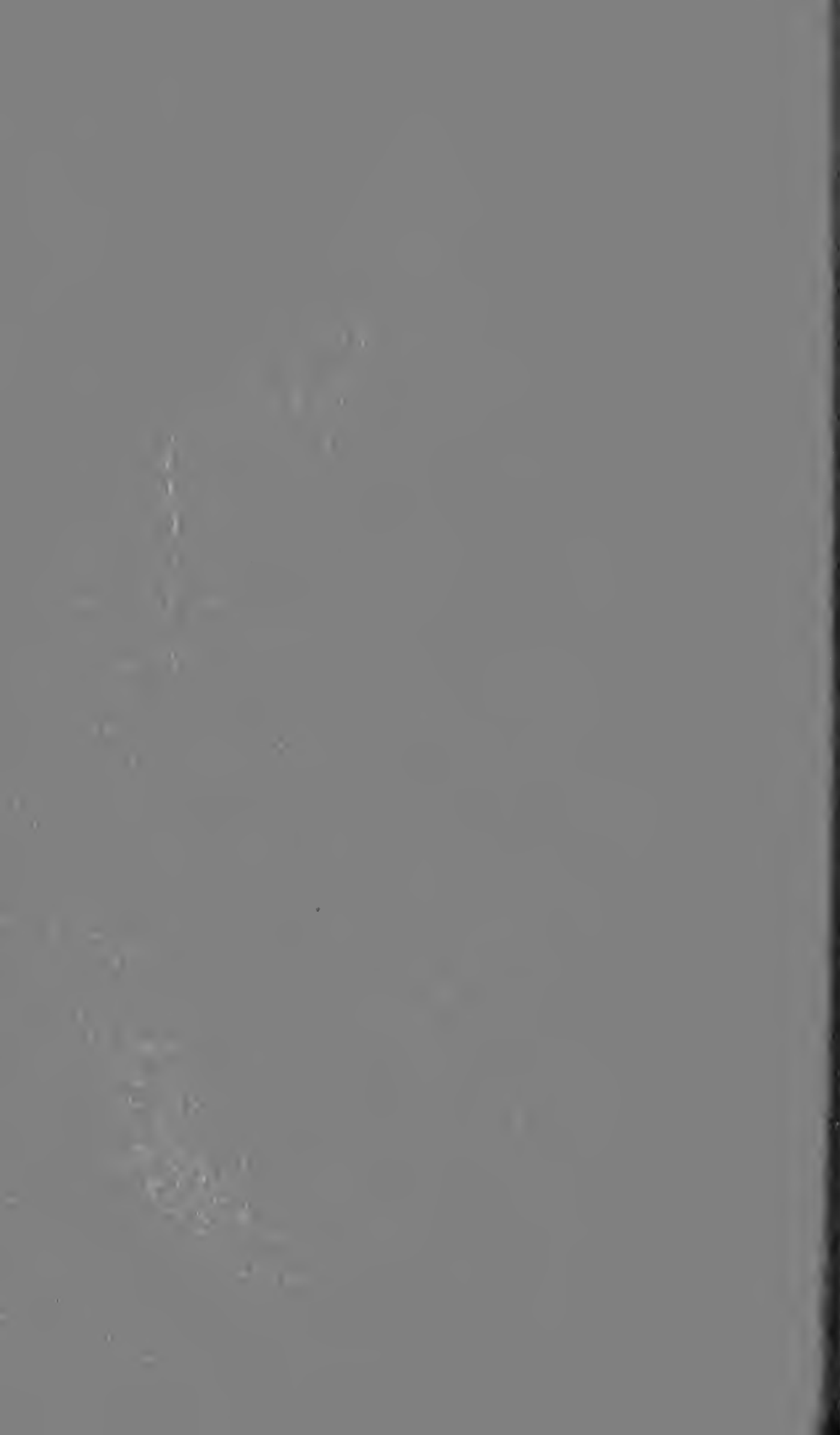
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IN THE
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MATSON NAVIGATION COMPANY, a corporation.

Appellant,

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WAR DAMAGE CORPORATION, a corporation,
Appellee.

Appellee.

APPELLANT'S REPLY BRIEF

I. THE LOSS OF THE LAHAINA WAS WITHIN THE STATUTE

A. The Loss of the Lahaina Falls Within the Plain Meaning of the Statute.

As its principal contention on the central question in this appeal, plaintiff asserted in its opening brief (pp. 7-11), that Section 5g of the Reconstruction Finance Corporation Act, by its plain language, covered the loss of the Lahaina.

That contention of plaintiff stands unchallenged. Defendant's brief makes no contention that the literal meaning of the statute excluded from its protection ships as contrasted with other forms of property.

Defendant asserts, however, that the law must be deemed to have a meaning different from its normal and natural mean-

ing, because of an alleged usage current in certain marine insurance policies and practices (Def. Br., pp. 43-50). This contention is made despite assurance by the defendant elsewhere in its brief (pp. 8, 32) that the Act had nothing to do with marine affairs. Having anticipated this contention of the defendant (Op. Br., pp. 12-17) it is unnecessary to demonstrate again its lack of merit. Moreover, the form of the "in transit" clause as originally adopted completely refutes defendant's argument that the language was used in any technical sense. The clause was added by the Clark Amendment (Sen. Com. Hearings, p. 73) which simply inserted the words "or in transit between" so that the bill read:

"Such protection shall be limited to property situated in
OR IN TRANSIT BETWEEN the United States, etc."

Plainly the property to be covered "in transit" was identical with the property to be covered while situated in the United States.

Defendant also argued (Def. Br., p. 41) that the statute covers only such property as defendant failed to exclude under its alleged power to make "general exceptions." Actually that assertion has no bearing on the meaning of the phrase "property in transit." Whether the defendant had power to exclude ships and did so is discussed elsewhere. But the existence or non-existence of that power has no bearing on the interpretation of the statute.

B. There Is No Occasion for Resort to Legislative History.

Although defendant does not challenge plaintiff's assertion that the statute by its plain meaning applies to ships as well as cargo or other personal property, it asserts that even in the face of clear and unambiguous language, legislative history will be resorted to to determine whether Congress intended the literal meaning.

Defendant offers no answer to our claim that the Supreme Court has halted unrestrained use of legislative materials.

Packard Company v. Labor Board (1947) 330 U.S. 485, 91 L.Ed. 1014, 67 S.Ct. 789, except to state that the dissenting justices relied on such materials.

Defendant simply ignores the rule laid down in *Barr v. United States*, 324 U.S. 83, 89 L.Ed. 765, 65 S.Ct. 522 (Op. Br., p. 19) where the court said:

"But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators. *Puerto Rico v. Shell Co.*, 302 U.S. 253, 257; *Browder v. United States*, 312 U.S. 335, 339, and cases cited." (p. 90)

Clearly then, even if the chief purpose of the "in transit" provision of the law was to cover cargoes, even if Congress never contemplated the application to the law to ships, that would not suffice to alter or restrict the plain meaning of the statute.

Ignoring these rules, the application of which disposes of this controversy, defendant plunges into the legislative history of the statute.

C. The Legislative History Shows No Intention to Exclude Ships; on the Contrary Ships Were Consciously Included.

We asserted that nothing in the legislative history showed that *anyone* wanted to exclude ships or to treat them differently than cargoes.

Defendant has sifted the legislative materials with a fine comb but has produced not a single statement to indicate that anyone wanted to exclude ships. All that defendant has been able to do is to marshal a long array of statements about cargo protection. As we have noted above, that is not enough to restrict the application of the law.

In a detailed summary of legislative history set forth in plaintiff's opening brief, we showed that it was consonant with the

basic purpose of the law to protect ships as well as other forms of property. We quoted numerous statements by witnesses, members of the Congressional Committee considering the bill, floor managers and Congressmen, indicating either an understanding that the bill was all-inclusive or specifically showing the purpose and intent of protecting ships.

Defendant has chosen to ignore many of these remarks and to explain others by imputing to the speakers an intent contrary to what they said. But for the most part defendant has confined its attention to statements which refer to cargoes, merchandise or other forms of property embraced within the protection of the statute, on the theory, apparently, that by proving an intent to cover these specific properties the plain meaning of the statute will shrink enough to exclude ships.

Defendant completely ignores the form of the Clark Amendment which, by merely adding the words "or in transit between," showed plainly that the "property" protected while in transit was identical with the "property" protected while in the United States (Op. Br., p. 37).

Defendant explains Senator Clark's explanation of the amendment:

"That would merely remove the limitation, so that you could go into this question of *shipping*" (Sen. Com. Hearings, p. 73)

by arguing that "shipping" did not include vessels in Senator Clark's mind (Def. Br., p. 18). Here defendant draws not upon the record, but instead imputes to the Senator an intention contrary to his own words.

Other quotations from the proceedings in the Senate Committee showing an intention to duplicate Maritime Commission functions, and thus to protect ships as well as cargoes, are ignored by defendant (Op. Br., pp. 39, 41).

Again, the statement of Senator Maloney, in introducing the bill to the Senate, that it goes all of the way in providing protection against enemy attack for the tangible property of Americans (Op. Br., p. 42) is ignored, as are other statements asserting an all-inclusive coverage (Op. Br., pp. 33, 46, 47).

Defendant attempts to explain the explicit statement of Mr. Steagall, Committee chairman, while explaining the bill to the House (Op. Br., pp. 45-48). Mr. Steagall replied to a question of Mr. White whether the bill applied to cargoes and *ships* and flatly answered "Yes, under certain conditions" (88 Cong. Rec. 1847). Defendant assures the court that Mr. Steagall replied "hastily" and that he "obviously was not sure of his grounds." (Def. Br., p. 27).

Nothing in the Congressional Record supports this assertion that Mr. Steagall was hasty in his reply or not sure of his grounds.

Defendant attempts to explain this categorical statement that the Act gave protection to ships by explaining that Mr. Steagall referred Mr. White's question to Mr. Bland, who added the information that such matters were being taken care of under an amendment to the Maritime Commission's authority. That answer of Mr. Bland, instead of being the equivalent of a denial that defendant could cover vessels, as defendant suggests, is in fact but a part of his discussion ending by Mr. Bland's statement that "*if there should be a case which is not covered by the maritime insurance legislation then this takes care of that.*" Mr. Steagall added: "*That is quite correct.*"

These remarks of Mr. Steagall and Mr. Bland plainly show that the War Damage law covered every type of property that the Maritime Commission could cover and perhaps more. The Maritime Commission was authorized to insure both cargoes and vessels and hence defendant was authorized to do so, except

for the proviso in the bill as it existed at that time, prohibiting defendant from covering anything which the Maritime Commission could insure. But any marine risk, including ships not within the authority of the Maritime Commission, would be covered by the defendant.

In conference, the proviso that defendant could not insure what the Maritime Commission could insure was amended to be effective only when the paid program thereafter became effective. In other words, during the free period, the defendant had authority to insure whatever the Maritime Commission could insure, including ships.

After conference, Mr. Steagall answered flatly: "Yes," to the question of Mr. Smith:

"Under the temporary arrangement until the contracts are written, say July 1, are the *sinkings* that are taking place at the present time covered by the temporary arrangement?" (88 Cong. Rec. 2658)

Again defendant undertakes to look into the minds of Mr. Smith and Mr. Steagall and declare that they contemplated cargo only. Actually Mr. Smith, who propounded the question, elaborated upon what he meant when he asked his next question:

"This takes care of the *property* alone?"

Mr. Steagall replied, quite clearly:

"The property entirely."

Later in the proceedings, Mr. Smith again inquired about "sinkings" pointing out that since the committee hearings, there had been an "*immense amount of sinkings*" and inquiring about the propriety of giving free protection. Mr. Steagall replied that the matter was closed (88 Cong. Rec. 2660-2661).

Defendant says that the answer is ambiguous. Assuming it to be ambiguous, how could that fact justify a departure from the plain meaning of the statute? Furthermore, defendant's

argument that "sinkings" refers to cargo and not to ships, is inconsistent with its argument that Congress well knew that the largest losses then suffered were the losses of ships. In light of this knowledge, Mr. Smith's concern over the "immense amount of sinkings" would hardly refer to cargo only. Plainly, he and the others in Congress had in mind the large vessel losses already sustained.

D. Miscellaneous Agreements Advanced by Defendant.

1. THAT DEFENDANT WAS NOT INTENDED TO COVER WHAT THE MARITIME COMMISSION WAS AUTHORIZED TO COVER.

Defendant concedes that this statute covered at least some property, e.g. cargo, which the Maritime Commission was authorized to cover. In that concession defendant abandons the whole basis upon which the District Judge based his Opinion (Op. Br., p. 50). Defendant argues, however, that Congress was reluctant to duplicate functions and hence that the "in transit" coverage must be restricted in some way. Why the line should be drawn at ships is not indicated. At any rate, both the language of the statute and the legislative history show the duplication during the free period to be complete.

2. THAT THE STATUTE SHOULD BE INTERPRETED ON THE ASSUMPTION THAT CONGRESS WAS IGNORANT OF THE LAW.

In our Opening Brief (p. 53), we referred to the trial judge's misconception of the scope of the law as induced by the erroneous assumption that shippers of cargo to Hawaii and Alaska could not determine in advance whether their goods would be carried in American or foreign bottoms and that the "in transit" clause was prompted solely by the need to cover cargo in foreign bottoms.

Defendant asserts that Congress acted upon the same erroneous assumption and that the law must be construed in the light of their ignorance (Def. Br., p. 34). We do not share

defendant's skepticism about the knowledge of members of Congress. The only person who appears to have been confused in the hearings was Mr. Hamilton, counsel for the R. F. C. The laws excluding foreign flag vessels from the domestic trade have been a basic part of our policy for generations. Will it be supposed that the members of Congress, even the members of the Committees on Merchant Marine and Fisheries and Commerce were all ignorant of laws so long in effect?

We know of no rule of statutory construction that will impart to a law a meaning inconsistent with its words on the ground that Congress acted in ignorance of its own laws and was misled thereby.

3. THAT FAILURE OF OTHER SHIPOWNERS TO PRESENT A CLAIM SHOWS THAT EVERYONE UNDERSTOOD VESSELS WERE NOT COVERED.

Defendant argues that it is common knowledge that large numbers of ships were sunk by enemy action during the free period for which claims would have been presented if plaintiff's claim had any merit (Def. Br., p. 5).

This is neither a matter of knowledge nor record. We have no idea how many ships were sunk by enemy action during the free period. We have no idea how many of them were en route between two protected points, nor how many of them had not yet been taken over by the government.

We point out, however, that any prudent shipowner, once war had actually broken out, would have obtained war risk insurance from some source at some price or would not permit his ship to sail.

The press releases did not cover ships on the high seas and this statute was not enacted until March 27, 1942. Except for those vessels like the Lahaina, which were caught en route by the outbreak of war, we think it a safe guess that within a few days after the war began, shipowners either obtained war risk insurance or did not sail.

The absence of any substantial number of claims thus appears perfectly reasonable and is no ground for any inference about the merits of plaintiff's claim.

4. THAT AN INTERPRETATION OF THE STATUTE TO INCLUDE SHIPS WOULD LEAD TO ABSURD RESULTS.

In our Opening Brief (pp. 54-55) we asserted that an interpretation of the statute to *exclude* vessels would be irrational and discriminatory. Defendant replied by asserting that to *include* vessels would be absurd (Def. Br., p. 34).

Seemingly, defendant contends that it would be discriminatory and absurd for Congress to protect ships en route to a possession but not to protect a ship en route elsewhere.

The short answer is that that is exactly what Congress admittedly did with respect to cargo. We claim only that the vessel is entitled to protection to the same extent as the cargo. We are unable to see how defendant, charged by Congress with administering the law, can be heard to assert that it would be irrational, discriminatory and absurd for Congress to do with vessels as it did with cargoes.

5. THAT DEFENDANT'S INTERPRETATION OF THE STATUTE IS ENTITLED TO WEIGHT.

Defendant asserts that the interpretation of a statute, made contemporaneously with its enactment, by the agency charged with its administration, is entitled to persuasive force (Def. Br., p. 38).

That rule is well settled, although it is subject to some qualifications not mentioned by defendant.

Aside from the caption, however, defendant neglects to state what the interpretation was, when and how it was made, or any other information about it. From the caption it may be inferred that defendant interprets the statute as not including ships. This action would have been sufficient evidence of that.

It is difficult to imagine how there could be any sort of administrative practice about ships since defendant asserts that only two other claims were made (Def. Br., p. 5).

Such vague assertions, unsupported by any facts, are not entitled to any weight at all.

II. THE FREE PROTECTION IS MANDATORY

Defendant makes the bold argument that it was *authorized* but not *required* to compensate for losses incurred during the free period (Def. Br., p. 67). This argument is based on the language of subsection (b) that loss or damage prior to the effective date of the paid program

"may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such damage."

Use of the word "may," defendant argues, shows that Congress intended to leave the matter to defendant's discretion.

A. The Question of the Form of Plaintiff's Remedy.

Defendant apparently was somewhat abashed by the implications of the proposition for which it contends, namely, that Congress had turned over to Mr. Jesse Jones one billion dollars with which to compensate such losses as he saw fit without even the pretense of any standard to guide his actions. Considering the mere potential of abuse of power any such interpretation would seem difficult to maintain.

Defendant seeks to make its position more plausible by asserting that its discretion was not entirely uncontrolled—that a person whose claim was unreasonably rejected would have a remedy in a writ in the nature of a Writ of Mandamus.

We are certain that defendant has unreasonably rejected plaintiff's claim. If a Writ of Mandate is the appropriate remedy it may, of course, be given in this action regardless of the form of relief asked for in the complaint. Rule 54(c) Fed. Rules of Civ. Proc.

We are unable to understand the precise nature of the discretion which defendant claims under this statute. It is well settled in the Federal Courts that the Writ of Mandate does not issue to control the exercise of a discretionary power, but rather, is confined to enforcing the performance of a plain and unmistakable duty. *United States ex rel Girard Co. v. Helvering* 301 U.S. 540, 543, 81 L.Ed. 1272, 57 S.Ct. 855; *Wilbur v. United States ex rel Kadrie*, 281 U.S. 206, 218-219, 74 L.Ed. 809, 50 S.Ct. 320.

Defendant's assertion that a Writ of Mandate may issue is a concession that the duty to compensate losses incurred during the free period is something more than a mere permissive authorization. If a Writ of Mandate may issue it can only be on the theory that defendant has a plain duty to compensate the loss. We think that defendant does have such a plain duty to compensate any losses within the scope of the statute. In this case, however, there is no need for a Writ of Mandate. The writ is an extraordinary remedy to be issued only when the traditional forms of relief do not afford an adequate remedy. *United States ex rel Girard Co. v. Helvering*, supra, at 544. A monetary judgment is an adequate remedy in the present case.

B. The Statute on Its Face Imposes a Mandatory Obligation to Compensate Losses During the Free Period.

A fair reading of the whole statute shows that the obligation to compensate losses incurred during the free period was intended by Congress to be mandatory.

1. THE WORD "MAY" IS A TERM OF ART. WHEN USED IN A STATUTE ADDRESSED TO A PUBLIC AGENCY IT ORDINARILY IS UNDERSTOOD TO BE MANDATORY.

The meaning of such words as "may" and "shall" in statutes has been the subject of a vast amount of litigation. The word "may" is inherently ambiguous, and draws its meaning from the context in which it is used. A well-settled rule has developed that when the word "may" appears in a statute addressed to a public officer, authorizing him to do an act for the benefit of a particular person or class, it ordinarily will be considered as *requiring* instead of simply *permitting* the action referred to.

On this point we place particular reliance upon *United States Sugar Equalization Board, Inc. v. De Ronde & Co.* (3 Cir.) 7 F.2d 981, cert. gr. 269 U.S. 548, dismissed by stipulation 271 U. S. 691. Other cases to the same effect are: *Supervisors v. United States*, 4 Wall. (71 U.S.) 435, 446-447, 18 L.Ed. 419; *Mason v. Fearson*, 9 How. (50 U.S.) 248, 258, 13 L.Ed. 125; *Chase v. United States* (8 Cir.), 261 Fed. 833, 837; *Parish v. MacVeagh*, 214 U.S. 124, 53 L.Ed. 936, 29 S.Ct. 556; *United States v. Cornell Steamboat Co.*, 202 U.S. 184, 50 L.Ed. 987, 26 S.Ct. 648.

The rationale of these cases is that the true interpretation of a statute depends upon the intent of Congress. When Congress authorizes a public agency to do an act for the benefit of some particular class, it is understood that in the ordinary course of things Congress does not intend to leave it to the agency's discretion; it intends that the act be done. *Supervisors v. United States*, *supra*.

But we do not rely only on this guide to Congressional intent. Other provisions in the Act, and the legislative history, show that Congress never intended to leave this matter of protection for the public against the risks of war to defendant's whim.

2. FREE PROTECTION CLAIMANTS WERE GIVEN THE SAME RIGHTS AS CONTRACT CLAIMANTS.

Defendant overlooks the closing words of subsection (b) stating that

"such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such damage."

By this language Congress obviously intended to place the free protection claimants on the same basis as policy holders under the paid protection plan. As between defendant and the claimants under the free protection, the rights and liabilities were to be measured "*as if*" a contract existed. Defendant does not suggest that there was anything discretionary or permissive about the obligation to make payments where its contracts were in force. Inasmuch as Congress has placed the free protection claimants in the same status, so far as their rights against defendant are concerned, defendant is in no position to assert that it is not obligated to make the payment.

3. THE PROVISIONS OF SUBSECTION (a) REVEAL THAT FREE PROTECTION WAS NOT DISCRETIONARY.

Defendant overlooks the fact that subsection (b) is not the only portion of the statute applicable to free protection. Subsection (a) also contains a direction to the defendant to compensate during the free period.

Subsection (a) directs defendant to provide protection against loss or damage "*which may result from enemy attack.*" The statute was enacted March 27, 1942. The free period did not end until July 1, 1942. It is apparent that the direction in subsection (a) is applicable to at least part of the free period.

Defendant does not argue that the direction to compensate given in subsection (a) is merely permissive or discretionary. Instead defendant asserts that subsection (a) was mandatory

in distinction to subsection (b), which it claims to be permissive. The result is that if defendant's argument is accepted, free protection from December 6 to March 27 is permissive and discretionary, but free protection from March 27 to July 1 is mandatory. Certainly, there is no reason to suggest that defendant's obligation with respect to the free coverage is different in one period than in another. There is not the slightest hint in the legislative history of any such distinction, nor can any reasonable basis for such a distinction be maintained.

Subsection (b), which applies to the *entire* free period, thus cannot have been intended to make defendant's obligation to compensate during this whole period discretionary.

C. The Legislative History Indicates That Congress Did Not Intend to Leave Payment to the Defendant's Discretion.

1. DEFENDANT WAS ALREADY OBLIGATED UNDER THE PRESS RELEASES TO COMPENSATE LOSSES OCCURRING WITHIN THE UNITED STATES.

Before Congress even considered the bill which became Section 5(g), defendant had already issued two press releases promising compensation for loss or damage to various properties in the United States (Op. Br., p. 24).

Nothing in the press releases hints that defendant's obligations were merely discretionary. Certainly Mr. Jones gave no such hint to Congress when he informed the Committees that everybody was already covered, and certainly they accepted his statements that the defendant had already issued a "blanket insurance policy,"* and that "Everybody now is reasonably covered by the \$100,000,000 provided."† To speak of an obligation in terms of an insurance policy is not to suggest any element of discretion with respect to the obligation to pay if the loss described should be incurred.

*See Sen. Com. Hearings, pp. 6-7.

†id., p. 8; House Com. Hearings, p. 26.

Is there any reason to assume that Congress intended to cut down these existing rights? Defendant has suggested none and we know of no basis upon which such an argument could be made. Yet the provisions of subsection (b) completely overlap the coverage provided by the press releases and go beyond it in expanding the kinds of property covered and adding the "in transit" provision. Certainly, Congress did not lessen rights already created by an Act which, on its face, expanded those rights.

2. FROM THE OUTSET FREE PROTECTION WAS RECOGNIZED AS MANDATORY.

The original bill was prospective only. It contemplated the issuance policies of insurance on payment of a premium. In the Senate Committee the bill was amended to provide free protection up to a limit of \$15,000. It was understood that, for the first time, coverage under the bill had become mandatory to this limit, while for coverage beyond that amount, defendant retained a measure of discretion in deciding whether or not to enter into any particular contract of insurance. The discussion in the Committee is specific on this point (see Sen. Com. Hearings, pp. 90-93).

The reason for a distinction between paid protection and free protection is apparent. Paid protection would be based upon contracts of insurance. Defendant might enter into such contracts or not so long as it conformed with the policy and purposes of the Act, namely, to provide "reasonable protection." Its action in accepting or rejecting an application for a contract of insurance in a specific case might be tested by something approaching normal standards of business judgment in the insurance industry (cf. *Fabey v. Mallonee*, 332 U.S. 245, 91 L.Ed. 2030, 67 S.Ct. 1552). No such standard was available to guide defendant in compensating damage already incurred.

Discretion in the acceptance or rejection of such claims would simply be an uncontrolled power in defendant's hands. This distinction between paid and free protection, explains why the members of the Senate Committee insisted that the free coverage must be mandatory.

The Danaher Amendment ultimately was abandoned and all future coverage after the July 1 deadline was required to be based upon policies of insurance to be issued for a premium. The attitude of the members of Congress with respect to the Danaher Amendment is, however, a substantial factor in guiding a court to the proper interpretation of the free protection provision later adopted.

3. THE ORIGINAL FORM OF THE AMENDMENT ADOPTING RETROACTIVE PROTECTION DEMONSTRATES THAT THE DUTY TO COMPENSATE WAS NOT LEFT TO DEFENDANT'S DISCRETION.

Retroactive coverage was first added to the bill in the House Committee. The language of the bill as reported out of the Committee unmistakably shows that the free protection was mandatory.

"The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to tangible real property and tangible personal property which may result, or *may have resulted*, from enemy attack. Such protection *shall be made available* through War Damage Corporation upon the payment of such premium and subject to such terms and conditions as War Damage Corporation, with the approval of the Federal Loan Administrator, may establish. *Any such loss or damage sustained prior to the approval of this act * * * may be compensated by War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and the loss may be adjusted as if a policy cover-*

ing such property was in fact in force at the time of such loss." (House Report No. 1752, p. 2).

It is perfectly clear that in this form the duty to compensate for loss or damage already incurred, as well as that which might occur in the future was mandatory and not permissive.

In the conference on the disagreeing votes of the two Houses, the form of the bill was recast so that the reference to compensation of losses during the free period was placed in a separate subsection (b). There is not a word in the legislative history to indicate that the general recasting of the statute at the last stage of its passage was intended to change its scope and effect.

D. Constitutional Considerations Require That Free Coverage Should Be Construed as Mandatory Rather Than Permissive if Such a Construction Is Reasonably Possible.

Defendant's contention that the free protection is merely permissive leads to an untenable result. If payment for the losses contemplated by the statute is mandatory there is no constitutional problem, for defendant has only to interpret and apply the statute. But if, as defendant argues, the statute is permissive with respect to the free period, then we think there is a violation of the constitutional prohibition against an uncontrolled delegation of power. It is readily apparent that the statute furnishes no guide by which defendant could test the propriety of compensating a particular loss already incurred. It is difficult to understand how any standard could be devised. Certainly no attempt was made to establish one.

Defendant suggests that the cases of *Bowles v. Willingham*, 321 U.S. 503, 88 L.Ed. 892, 64 S.Ct. 641, and *Yakus v. United States*, 321 U.S. 414, 88 L.Ed. 835, 64 S.Ct. 660, have eliminated the necessity of any standard to guide a federal agency (Def. Br., p. 63-66). In this connection, defendant relies particularly

upon Justice Roberts' dissent in the *Willingham* case, in which he complains that the court has virtually overruled *Schechter Poultry Corporation v. United States*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837.

Justice Roberts' dissenting comments about the effect of the *Willingham* case are not law. The majority in that case did not deny the necessity of a standard. Neither has any other decision done so.

The case of *Fahey v. Mallonee*, 332 U.S. 245, 91 L.Ed. 2030, 67 S.Ct. 1552, does not aid defendant. The court there found a standard in well-settled practices in the industry. But what practice is there in the insurance industry or elsewhere which would guide defendant in accepting or rejecting claims for losses already incurred?

It is a well-settled rule that, if reasonably possible, a statute will be construed so as to avoid doubts about its constitutionality. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82, 77 L.Ed. 175, 53 S.Ct. 42; *Screws v. United States*, 325 U.S. 91, 98, 89 L.Ed. 1495, 65 S.Ct. 1031. The constitutional question may be avoided here by holding that defendant's duty to compensate the losses covered by the statute is mandatory.

III. THE ALLEGED EXCLUSION OF VESSELS

Defendant claims that it had power to and did exclude vessels from the free protection granted with respect to losses already incurred. Defendant claims this power on the theory that the "general exceptions" clause gave it power to exclude vessels or other kinds of property from the *paid* protection which it was directed to set up for the future. And, defendant argues, it must have a similar power with respect to losses incurred during the free period before the paid plan went into effect.

A. Defendant Had No Power to Exclude Vessels or Other Kinds of Property from the Free Protection.

What we have already said in Section II of this brief about the mandatory nature of defendant's obligation to compensate losses during the free period foreshadows the answer to this claim of a power to make general exceptions applicable to such losses. If, as we have already shown, the *free* protection was mandatory, it follows that it is free of any power to make exceptions.

We think that defendant's basic premise, namely, that the "general exceptions" clause was intended to permit exclusions of *kinds of property* during the *paid* period is ill-founded. The legislative history demonstrates that the provision was added by the Senate Committee solely to permit area exclusions. Defendant, although conceding the original purpose and meaning of this provision (Def. Br., pp. 58-59), argues that, unknown to the Senators who had adopted the provision, the meaning changed because the House later added a somewhat similar provision of its own. The argument does violence to common sense.

It is sufficient, however, to point out that even if that argument were sound, defendant has failed to establish that the power with respect to the paid program was also applicable to the free coverage.

1. THE LANGUAGE OF SUBSECTION (b) DOES NOT SUBJECT THE FREE PROTECTION TO A POWER TO EXCLUDE KINDS OF PROPERTY.

Defendant's only argument to establish that this alleged power applied to the free coverage is the language of subsection (b):

"subject to the *authorizations* and *limitations* prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined * * *."

Defendant argues that a *power* to make exceptions is an *authorization* to do so and, therefore, the free protection was made subject to a power to make exceptions. We think that the more natural referrals for *authorizations and limitations* are the monetary authorizations and geographical restrictions, respectively.

Defendant's argument leads to the absurd result that the protection granted by subsection (b) depends entirely upon what defendant might do under its claimed power to make exclusions. In other words, the *statutory* grant of free protection would have no fixed or definite scope but would fluctuate as defendant, from time to time, might revise its list of exclusions. The anomalous result is that defendant's administrative rulings would change the meaning of the statute itself.

No precedent exists for such a construction, and certainly an interpretation leading to such a freakish result will be avoided. The meaning of *authorizations and limitations* to which the free protection is subject is that they are the authorizations and limitations fixed in the statute itself. We find the "authorizations" in the monetary authorization and the "limitations" in the geographical restrictions established by the statute.

There was no reason why Congress should wish to make the free protection, as distinguished from the future paid protection, subject to a power to make exception. The losses in the past period were known and considered (Op. Br., p. 49).

2. A GRANT OF RULE-MAKING POWER IS NOT TO BE CONSTRUED TO AUTHORIZE RETROACTIVE APPLICATION.

The power which defendant claims is essentially legislative in character, i.e., a rule-making power. Legislative power ordinarily is prospective in nature and establishes rules for the future in contrast with a judicial power which declares rights on past facts under existing rules. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 53 L.Ed. 150, 29 S.Ct. 67. It is a well-settled presumption that legislative power is intended only

to apply prospectively. *United States v. American Sugar Co.*, 202 U.S. 563, 577, 50 L.Ed. 1149, 26 S.Ct. 717; *United States v. St. Louis, etc. Ry. Co.*, 270 U.S. 1, 3, 70 L.Ed. 435, 46 S.Ct. 182; *Hassett v. Welch*, 303 U.S. 303, 314, 82 L.Ed. 858, 58 S.Ct. 559; 50 Am. Jur. 494-500. That principle is so firmly entrenched that if Congress had intended to permit retroactive rule making it would have said so explicitly. But all that defendant can point to in the language of the statute is the phrase "subject to the authorizations and limitations." Those words, as we have pointed out, are more naturally referred to the limitations imposed by the statute itself.

3. THE HISTORY AND PURPOSES OF THE STATUTE REFUTE THE CLAIM OF A POWER TO EXCLUDE KINDS OF PROPERTY FROM THE FREE PROTECTION.

Before Congress considered this law, defendant already had become obligated under the "blanket insurance policy," issued in the form of a press release, to compensate losses occurring in the United States. Certainly defendant had no power to make any exceptions to the protection there promised. It is also certain that Congress in confirming and extending that free protection did not intend to lessen the rights guaranteed by the press releases, yet defendant's argument necessarily imputes such an intent to Congress.

If Congress had any such intent, certainly there would have been some reference thereto. We found none, and defendant apparently has found none.

Moreover, such assertions as that of Chairman Steagall, that everybody was covered on everything *up to the time that the paid program would go into effect* affirmatively indicates that Congress had no idea that free protection was subject to defendant's power to exclude any kind of property (Op. Br., pp. 33, 42, 46, 47).

4. DEFENDANT'S LONG DELAY IN EXERCISE OF THE ALLEGED POWER TO EXCLUDE KINDS OF PROPERTY FROM THE FREE PROTECTION IS AN ADMINISTRATIVE CONSTRUCTION THAT IT HAD NO SUCH POWER.

Not until October 2, 1944, did the defendant purport to exercise the power which it now claims to exclude any class of property from protection during the free period. At that time the free period was well over two years past. Losses compensable during the free protection period had long since occurred; and, according to defendant's argument, it had long since been engaged in adjusting claims. If defendant in fact had the power which it claims, it certainly would have exercised it promptly, at least before it commenced consideration of claims.

Inaction is as truly an administrative construction as action. Failure to exercise a power in circumstances where it ordinarily would be exercised, if existent, is an administrative interpretation that the power does not exist. *F. T. C. v. Bunte Bros.*, 312 U.S. 349, 351, 352, 85 L.Ed. 881, 61 S.Ct. 58.

Defendant has suggested that its resolution of October 2, 1944, was nothing more than a "formalization" of earlier administrative practice (Def. Br., p. 57). This we deny. The evidence of such an "administrative practice" consists only of vague self-serving declarations that the resolution was merely declaratory of administrative practice. The evidence of the practice is dubious to say the least. There is no indication that defendant ever rejected a claim in reliance upon a purported authority to exclude any kind of property from the free protection. Certainly there was no "practice" with respect to vessels, for defendant states that only three claims, including plaintiff's, were presented (Def. Br., p. 5). At any rate the trial court made no finding of the existence of such an administrative practice, and in view of the evidence it scarcely could have done so.

Moreover, such a practice, if it existed, could not aid defend-

ant. Defendant contends that it had power to make "general exceptions" required by the statute to be approved by the Secretary of Commerce. A corporation acts through its board of directors. No such action was taken prior to October 2, 1944. The vague suggestions that the Secretary of Commerce acquiesced in these practices does not constitute the approval required by law.

If defendant's adjustors actually rejected any claims on such grounds, their action was arbitrary and does not establish administrative practice. It is only high-handed disregard of statutory duty and obligation.

B. The Exclusion of Vessels Was an Unreasonable and Arbitrary Act.

Even if defendant was empowered to exclude classes of property from the free protection, still the resolution of October 2, 1944, was void to the extent that it purported to exclude vessels.

In our Opening Brief (pp. 54, 55) we pointed out the lack of foundation for excluding vessels from the protection afforded property in general. What we said there, concerning the reasonableness of imputing to Congress an intent to exclude vessels, is equally applicable here.

On what theory is a vessel less deserving of protection than other forms of property? It was exposed to the greater risk and, as defendant has argued, the statute was primarily intended to cover the kinds of property exposed to the greatest risk. Neither can ships be said to fall in the class of property of doubtful utility such as furs or objects of art. Ships were more vital to the war effort and the public interest than any other property.

Defendant offers no argument to sustain the reasonableness of excluding ships except to say that it was consonant with de-

fendant's interpretation of the statute (Def. Br., p. 62). If defendant is right about the interpretation of the statute, it is immaterial whether defendant could or did exclude ships. But if the statute covers ships, then the whole basis of defendant's exclusion dissolves, for the exclusion plainly was made as an *interpretation* of the statute—not as an act of administrative discretion.

In the lower court defendant argued that the exclusions from the *free* protection made on October 2, 1944, must be reasonable because similar property was excluded from the *paid* protection at the outset of the program. The argument cannot aid defendant with respect to vessels for the statute itself excluded vessels during the paid program, but by an express amendment this limitation was removed from the free protection. Defendant's resolution of October 2, 1944, must stand on its own feet.

The particular circumstances in which the resolution of October 2, 1944, was adopted sufficiently refute any presumption of administrative regularity. In fact, it appears that the resolution was adopted in order to defeat a specific claim then pending—the Union Oil Company's claim for the loss of its tanker Montebello (Tr. 348, 367). A power to make "general exceptions" is not properly exercised as a veto over a specific claim.

We respectfully submit that the exclusion of vessels, made solely as an interpretation of the statute under the circumstances involved in this case, is arbitrary and unreasonable and should be rejected by the court as inconsistent with the statutory command to provide "reasonable protection."

It is familiar learning that the exercise of an administrative power is invalid if it bears no reasonable relation to the purpose for which it was authorized or if it creates arbitrary distinctions inconsistent with the purposes of the statute. *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 69, 81 L.Ed. 510, 57

S.Ct. 364; *Manhattan General Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 80 L.Ed. 528, 56 S.Ct. 397.

IV. THE ARGUMENT THAT DEFENDANT HAS NOT DETERMINED WHAT CONSTITUTES REASONABLE PROTECTION

Plaintiff alleged a loss as the result of the sinking of the Lahaina. It proved the "fair cash market value" of the property at the time of the loss by a stipulation (Tr. 60) and demands judgment for that amount as the "reasonable protection" assured by the law. But defendant argues that the measure of "reasonable protection" cannot be determined by a court—that it is a matter solely for defendant's administrative discretion (Def. Br., p. 75).

We fail to see why the courts that have already worked out by judicial decision the measure of "just compensation" should be helpless before the words "reasonable protection," particularly in view of the fact that subsection (b) directs defendant to "compensate" losses during the free period.

Doubtless it is true that if defendant had interpreted the term to prescribe some formula reasonably adapted to the purpose, a court would accept the interpretation. But that is not what defendant contends. Defendant has not pleaded any such interpretation or regulation establishing some lesser measure of "reasonable protection." It does not even argue that it has done so. It does not even claim that fair cash market value is not the appropriate measure. It does not even claim that in its administrative discretion it would determine upon a different measure.

This defendant simply claims that even though plaintiff is entitled to judgment, the court cannot give it because defendant has not yet acted. Plaintiff's claim was made almost 4 years ago. This suit has been pending more than 3½ years. Surely, if

defendant honestly believed that some formula less than fair cash market value was the appropriate measure of "reasonable protection," it would have acted to establish it.

The fact is that defendant long since has determined that "*actual cash value*" is the measure of reasonable protection. That was established at the outset of the paid protection plan (Tr. 49). We do not claim that this measure applies to free protection simply because it is one of the terms of the standard policy issued during the paid period. Rather, we contend that defendant cannot establish the measure of "reasonable protection" on an *ad hoc* basis. Having acted to establish "*actual cash value*" as the measure during the *paid* period, defendant has no power to establish a different measure for the *free* period.

This conclusion is affirmed by one of the provisions of the resolution of October 2, 1944, providing:

"All property insured against war risks by insurers other than this Corporation be, and the same is excepted from protection under the said Act in any amount greater than the excess of the *fair cash value* of such property over and above the amount of such other insurance, whether collectible or not."

In the light of what defendant has already done, its claim that a court cannot determine the amount which constitutes "reasonable protection" is plainly without merit.

V. PLAINTIFF'S CLAIM WAS FILED AND SUIT WAS BROUGHT WITHIN THE TIME REQUIRED BY LAW

Defendant has revived some, but not all, of the arguments made in the court below to support its claim that plaintiff is barred by delay.

Since the federal statute prescribed no period of limitation, the California statute of limitations applies 28 U.S.C. Section

1652; *Campbell v. Haverhill*, 155 U.S. 610, 39 L.Ed. 280, 15 S.Ct. 217. The applicable California statute is Code of Civil Procedure, Section 338, prescribing a three year period for an action brought upon a liability created by statute. The statute was enacted March 27, 1942. This suit was filed March 22, 1945. Hence, if plaintiff's claim is barred, it must be by virtue of some regulation validly enacted by defendant.

It is not necessary to consider here whether defendant had the *power* to impose any time limitations, for defendant never did so.

A. The Limitations Claimed by Defendant to Be Applicable.

We turn now to the two sources upon which defendant relies to support its claim that plaintiff is barred by delay.

1. THE 12 MONTH TIME LIMIT ON SUITS, PROVIDED FOR IN THE TERMS OF THE STANDARD POLICY, DOES NOT APPLY.

Defendant points to the language in subsection (b) providing that losses during the free period were to be adjusted

"as if a policy covering such property was in fact in force at the time of such damage."

This language, defendant argues, should be construed to refer to the standard form of policy, which defendant some months thereafter adopted, and to require that claimants under the free protection of subsection (b) comply with the terms of such policy. One of those terms is that suit must be brought within 12 months of the date of loss.

The fair implication of the quoted language is that Congress intended to create, between defendant and claimants under subsection (b), the same sort of rights and liabilities as would exist if a contract had actually been in existence. The terms

of the "as if" policy need no amplification beyond the provisions of the statute itself.

Even if defendant had power to prescribe the terms of this hypothetical contract, it is plain that it did not do so. Nothing in the policies of insurance which defendant subsequently entered into suggested that their provisions were applicable to claims under the free period. No regulation of defendant made them applicable.

The absurdity of the argument is emphasized by another term of the standard policy which required proof of loss to be filed within sixty days. It is unthinkable that such a provision, in a policy issued more than six months after the loss, should be applicable to the free protection. Defendant pleaded this point and, in the court below, hinted vaguely that although plaintiff obviously could not be required to conform to this requirement, still plaintiff was bound by the "spirit" of the requirement and should have been required to file its claim as promptly as possible. Even this suggestion has been abandoned in defendant's brief on this appeal.

2. THE PRESS RELEASE OF DECEMBER 30, 1942 HAS NO LEGAL EFFECT.

Defendant argues that plaintiff is barred because it did not file its claim prior to February 1, 1943, as requested in a press release issued December 30, 1942.

Assuming that defendant had power to prescribe a time limit, our answer is that this press release did not require any such action and was not intended to serve that purpose.

It will be noted that the press release merely announces that defendant "* * * will investigate claims * * *" and that such claims "should be filed with the Washington office of War Damage Corporation on or before February 1, 1943." (57) On its face, the release is not a rule of law at all. It does no more

than urge prompt filing. There is no hint or suggestion that a claim will be barred, unless filed within that time. For the court's convenience, we have set forth the text of this press release in the Appendix. A brief examination, we think, will suffice to convince the court that it was not intended or competent to establish a time limit for filing claims under the free protection.

The remarkably short time—only one calendar month—allowed for filing claims, is further evidence that this press release was not intended to constitute a bar. If it was, we think that the time would have been unreasonably short.

The press release was not published in the Federal Register. Defendant states that the Federal Register Act did not *permit* publication, citing 44 U.S.C.A., section 305a (Def. Br., p. 77). The only basis which we have found for saying that publication was not permitted is a regulation providing that

"No notices shall be published in the Federal Register, except those having general applicability and *legal effect*
* * *."

(1 C.F.R., Cum. Supp. Sec. 2.25)

We think defendant correctly concluded that the press release was a notice having no legal effect.

B. Defendant's Rejection of Plaintiff's Claim Without Referring to the Alleged Limitations Is Fatal to This Defense.

Plaintiff's claim was rejected by defendant in a letter which made no reference to the provisions of the standard form of policy or to the press release (6, 7). The fact that defendant ignored this very simple and clearcut ground upon which it might have rejected the claim if its present contention is true, is evidence that defendant's own interpretation was that neither applied. In this connection, it is significant that defendant was

entirely silent about its administrative practice, with respect to these alleged limitations. There is no suggestion that any claim under the free period was rejected on the ground that it was not prosecuted in the time specified in the standard policy or the press release. On the contrary, it would appear from Mr. Goodale's testimony that the *first* claim under the free period was not adjusted until February 1943 (319).

The failure to assert these technical defenses in rejecting plaintiff's claim has further significance. In *Oelbermann v. Toyo, K. K. Kaisha* (9 Cir. 1925) 3 F.2d 5, cert. den, 268 U.S. 693, 69 L.Ed. 1161, 45 S.Ct. 511, this court held that such defenses were waived by failure to assert them *in limine*.

Recognizing the authority of that decision, defendant seeks to escape it by arguing that under the rule of *Erie Railway Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, the matter is governed by California law, and that in *Hubbard v. Matson Navigation Co.*, 34 Cal. App. 2d, 475, 93 P.2d 846, the California Court declined to follow the *Oelbermann* case. The point is not material. If California law governs, as defendant claims, then Insurance Code Section 554 is applicable:

"§ 554. Waiver of delay. Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by an act of his, *or if he omits to make objection promptly and specifically upon that ground.*"

The provisions of this statute, expressly applicable to insurance contracts, rather than the general language of the *Hubbard* case, which involved a bill of lading, must control.

VI. THE REPEAL OF SECTION 5(g) IS IRRELEVANT

Apparently as an afterthought, counsel for defendant have appended to their brief an argument based upon the repeal of Section 5(g) of the Reconstruction Finance Corporation Act.* The contention is that plaintiff's claim for recovery is based upon that section and that its repeal is fatal to the claim.

Although the repeal was effected several months before judgment in the trial court,† this is the first hint of such a defense. In fact the argument deserves no more attention than it received.

It is not necessary to consider whether plaintiff's claim was one which Congress could not constitutionally destroy (cf. *Lynch v. United States*, 292 U.S. 571, 78 L.Ed. 1434, 54 S.Ct. 840), for it plainly appears that the repeal was not intended to affect pending claims.

Aside from constitutional limitations the effect of the repeal of a statute upon pending claims depends upon the intent of Congress 50 Am. Jur. 533. Where, as in the Portal to Portal Act,‡ Congress clearly intended to destroy pending claims the intent was given effect. *Seese v. Bethlehem Steel Co.* (4 Cir. 1948) 168 F.2d 58. On the other hand, repeal may simply have the effect of preventing the accrual of further claims. Thus, where the court found that Congress intended only to make the new rule effective as to the future, pending claims continued to be governed by the repealed statute. *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 72 L.Ed. 509, 48 S.Ct. 236.

*Repealed by the Act of June 30, 1947, Pub. L. 132, 80th Cong., 61 Stat. 209.

†The case was tried on April 30, 1947. The statute was repealed June 30, 1947. The trial court's opinion was filed November 17, 1947.

‡Public Law 49, C. 52, 80th Cong., 1st Sess.; 29 U.S.C. Section 251.

In the present case it plainly appears from two considerations that Congress did not intend to destroy pending claims.

Title 1, U. S. C. Section 29, prescribes a rule of construction, sometimes described as a general saving clause, reading in part:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Although this section has found its most frequent application in penal statutes, it is not so confined. Thus it has been held applicable to such diverse situations as the "liability" of a creditor who has received a preference under a repealed bankruptcy act, *Tinker v. Van Dyke*, (C. C. Mich. 1876) Fed. Cas. No. 14,058; *Warren v. Garber*, (C. C. Va. 1877), Fed. Cas. No. 17,196; *Bradberry v. Galloway*, (D. C. Cal. 1875), Fed. Cas. No. 1,764, to a taxpayer's "liability" to pay a tax imposed by a repealed statute. *Hertz v. Woodman*, 218 U.S. 205, 54 L.Ed. 1001, 30 S.Ct. 621, and to "liabilities" for unfair labor practices under the National Labor Relations Act (29 U.S.C. Section 151, et seq.) despite the new rule introduced by the Taft-Hartley Act (29 U.S.C. Section 141, et seq.) *National Labor Relations Board v. Mylan-Sparta Co.* (6 Cir. 1948), 166 F.2d 485.

The repealing act (61 Stat. 209) contains nothing to refute the application of Title 1 U.S.C. Section 29. The fact that the repealing act contains a saving clause does not preclude application of Title 1, U.S.C. Section 29. *Great Northern Railway Co. v. United States*, 208 U.S. 452, 52 L.Ed. 567, 28 S.Ct. 313. In fact, even without the aid of this general rule of construction, the repealing act itself reveals an intent not to destroy existing claims.

The statute which effected the repeal was a complete revision of the Reconstruction Finance Corporation Act. Even a casual reading of the statute shows that it was intended only to eliminate the historical oddities which remained from the war. The repeal of Section 5(g), which directed defendant to compensate war losses, cannot under these circumstances be taken as an indication of Congressional intent to destroy pending claims. In the light of the general policy declared in Title 1, U.S.C. Section 29, the conclusion is beyond reasonable doubt.

CONCLUSION

The plain meaning and basic policy of the statute brings vessels within the free protection. The legislative history demonstrates that this particular application of the law was explicitly recognized. Certainly, nothing in that history indicates a contrary intent. We submit that the plain meaning of the statute must prevail and defendant's principal argument, on which the trial court based its opinion, must be rejected.

With respect to the various affirmative defenses argued by defendant, we have shown that for obvious reasons Congress intended that compensation for losses occurring in the free period should be mandatory and that neither the letter nor the spirit of the law permits a construction which would make the free protection subject to any power to make exceptions. Moreover, defendant's purported exercise of the alleged power, by excluding vessels, cannot be supported on any rational basis.

We have shown that the fair cash market value is the appropriate measure of recovery and ask that the Court direct judgment for plaintiff in the principal sum of \$615,000.00.

Dated: October 26, 1948.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

Release. RFC-1718

THE SECRETARY OF COMMERCE

Washington

December 30, 1942.

Jesse Jones, Secretary of Commerce, today announced that War Damage Corporation will investigate claims for loss of property in transit between any points located in the United States, and the Canal Zone, and the Territories and possessions of the United States with the exception of the Philippine Islands. All claims for loss of property in transit between such points which resulted directly from enemy attack between December 6, 1941, and July 1, 1942, should be filed with the Washington office of War Damage Corporation on or before February 1, 1943. Investigation of such claims will be conducted in accordance with the provisions of Section 5g of the Reconstruction Finance Corporation Act, as amended.

All claimants are notified that, notwithstanding the investigation, War Damage Corporation reserves the right, in accordance with the statute and the regulations issued thereunder, to determine whether or not the corporation is liable.





